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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

ROBERT SCOTT MORELAND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is:

(1) Whether the Bureau of Prisons' Interpretation Of "Official Detention" in Program Statement 5880.24 (5)(b)(5) is Unreasonable in Light of the Plain Meaning and Legislative History of "Official Detention" Within 18 U.S.C. § 3585.

LIST OF PARTIES

Petitioner, Robert Scott Moreland, is the sole party in this case whose judgment is sought for review.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Robert Scott Moreland respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eight Circuit entered in this proceeding on June 30, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit on rehearing *en banc* affirming the district court's denial of Moreland's habeas corpus petition is reported at

1992 WL 145034 (8th Cir. (Minn.)), and is reprinted in the appendix submitted with this Petition.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit on rehearing *en banc* was entered on June 30, 1992.

The jurisdiction of this Court to review the judgment of the Eighth Circuit by means of certiorari arises under 28 U.S.C. § 1254(1). This petition is filed timely pursuant to Rule 13.1 of the Rules of the Supreme Court of the United States, in that it was filed on or before September 28, 1992, ninety days after entry of judgment of the Court of Appeals for the Eighth Circuit on rehearing *en banc*.

STATUTES AND AGENCY REGULATIONS INVOLVED

18 U.S.C. § 3585 is entitled "Calculation of a term of imprisonment." Section 3585 (b) provides:

> (b) Credit for prior custody. A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences-
>
> (1) As a result of the offense for which the sentence was imposed; or
>
> (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

that has not been credited against another sentence.

18 U.S.C. § 3585 has been reprinted in its entirety in the appendix, along with 18 U.S.C. § 3568, which it replaced.

The Bureau of Prison's Program Statement 5880.24 (5)(b)(5), from the directive entitled "Sentence Computation, Jail Time Credit Under 18 U.S.C. § 3568," states (emphasis in original):

> (5) Time spent in residence in a *residence community center* (or a community based program located in a Metropolitan Correction Center or jail) under the provisions of 18 U.S.C. 3146 as a condition of bail or bond, including the "Pretrial Services" program (18 U.S.C. 3152-3154), is not creditable as jail time since the degree of restraint provided by residence in a community center is not sufficient restraint to constitute custody within the meaning of intent of 18 U.S.C. 3568. Also, a "highly restrictive" condition of bail or bond, such as requiring the defendant to report daily to the U.S. Marshall, is not considered as time in custody. However, time spent in a *jail-type facility* (not including a community based program located in a Metropolitan Correctional Center or jail) as a condition of bail or bond is creditable as jail time because of the greater degree of restraint.

STATEMENT OF THE CASE

On July 26, 1989, a grand jury in the District of Minnesota indicted the petitioner Moreland on two counts of bank fraud. Moreland was taken into custody on July 29, 1989, and held until September 5, 1989, when

he was released on bond. As a condition of release, Moreland was ordered to reside at the Reentry Services Community Treatment Center ("RSCTC"). While at RSCTC, Moreland was ordered to obey all the rules and regulations of the center, and was treated like all the other sentenced prisoners serving their time at the center.

Moreland's detention at RSCTC passed through a number of stages. During the first two weeks, he was physically confined and could not leave the grounds. In week three and four, Moreland was allowed to seek employment, at RSCTC's direction, between the hours of 8 a.m. – 4 p.m. In week five, he obtained employment, and was given a curfew of 7 p.m. This curfew last two weeks. During weeks seven and eight, his curfew was raised to 10 p.m. After nine weeks, his curfew was extended to 12 midnight. During Moreland's entire imprisonment at RSCTC, he was physically confined in a room without any outside visitors between the hours of 12 midnight and 8 a.m. the following morning. If Moreland violated any rules at RSCTC, he was subject to arrest, revocation of his release, detention in jail and/or prosecution for Contempt of Court, which carries a maximum sentence of 5 years imprisonment and a $250,000 fine. Moreland resided at RSCTC from September 5, 1989, until March 12, 1990.

On October 20, 1989, Moreland pleaded guilty to one count of fraud. On February 2, 1990, the district court sentenced him to 18 months imprisonment. On March 12, 1990 he was transferred from RSCTC to the Federal Prison Camp in Duluth to serve his sentence. The Bureau of Prisons ("BOP") refused to grant Moreland sentence

credit for the 150 days prior to sentencing that he spent at RSCTC, September 5, 1989 – February 2, 1990. Moreland pursued an administrative remedy, but was again denied sentence credit on the grounds that it was BOP policy to deny pretrial detainees sentence credit for any time spent in a community treatment center ("CTC") awaiting trial or disposition of their case, pursuant to the BOP's Program Statement 5880.24 (5)(b)(5).

Moreland then filed a Motion to Grant Sentencing Credit pursuant to 28 U.S.C. § 2255, arguing that he had been denied equal protection of the law because the conditions of confinement at RSCTC were identical to conditions imposed on other inmates who were serving sentences and were given credit for time served at RSCTC. The District Court denied Moreland's motion by an Order dated June 27, 1990, adopting the position expressed by the Tenth Circuit *United States v. Woods*, 888 F.2d 653 (10th Cir. 1989), *cert. denied*, 110 S.Ct. 1301 (1990), which held that the degree of restraint in a halfway house was inefficient to constitute a deprivation of liberty comparable to jail. The case further held that the divergent legal status of those serving sentences and those waiting for sentencing negated the possibility that the two could be similarly situated for the purposes of an equal protection analysis. *Id.* Based on the reasoning of that case, the Court concluded that Moreland had not been denied equal protection and upheld the BOP's decision not to credit Moreland's time at RSCTC.

On September 11, 1990 Moreland appealed to the Eighth Circuit Court of Appeals, arguing that (1) his pretrial detention at RSCTC was "official detention" within the meaning of 18 U.S.C. § 3585 (b), and that (2)

the BOP violated his rights to equal protection by denying him sentence credit for time served in a CTC before sentencing while simultaneously granting sentence credit to sentenced prisoners residing at the same CTC. The Eighth Circuit panel, in a 2-1 decision, reversed, holding that the time Moreland spent at the CTC constituted "official detention" within the meaning of 18 U.S.C. § 3585 (b). *Moreland v. United States,* 932 F.2d 690 (8th Cir. 1992), *reh'g granted, opinion and judgment vacated.* The appellate decision falls on the statutory interpretation of the words "official detention," which Congress did not define.

Senior Circuit Judge Heaney, arguing for the majority, noted that there was already a split among the court of appeals on this statutory interpretation issue, and sided with the Ninth Circuit. In *Brown v. Rison,* 895 F.2d 533 (9th Cir. 1990), the Ninth Circuit took the position that restrictions of a halfway house were "simply too close to incarceration to permit a distinction for the purposes of credit against [Brown's] sentence" when residents were subject to its regulations, to drug testing, to curfews, and to work agreements. *Id.* at 536. Judge Heaney noted that the BOP had defined "official detention" to exclude time in which a defendant is released on condition that he detained at a CTC. Acknowledging the Court's responsibility to defer to the BOP's interpretation of "official detention," Judge Heaney agreed with the Ninth Circuit that such deference was unnecessary when the BOP's interpretation was unreasonable and "contrary to the considerations of fairness that must have underlain Congress' provision of credit for time served." *Moreland v. United States,* 932 F.2d 690, 694 (8th Cir. 1992), *reh'g granted, opinion and judgment vacated,* (quoting *Brown,* 895 F.2d at 536). The Court reasoned that the "restrictions

placed on Moreland [were] similar to those placed on jail prisoners who have jail work-release privileges, and it cannot be contended that such prisoners are not in "official detention." *Id.*

The Court went on to qualify its opinion by stating that defendants released to CTCs are "not automatically entitled to sentence credit. A defendant must demonstrate that he was subject to conditions closely approaching or equaling incarceration. Only those defendants released under highly restrictive conditions will be entitled to sentence credit. It is not enough to be subject to some conditions, such as electronic monitoring, a requirement to live with one's parents, and a curfew. The defendant must also be in an institution and subject to that institutions jail-like rules, as here and in *Brown*." *Id.* at 695.

In dissent, Judge Magill argued that the majority should have deferred to the BOP's interpretation of the statute since the statute is ambiguous, and that the Bureau must be given reasonable latitude in interpreting it. Judge Magill also argued that the plain meaning of the term "detention" did not extend to the kind of restrictions imposed on Moreland. The dissent also noted that Congress's use of the word "detention" in Section 3585 brought that statute in line with the Bail Reform Act, which distinguishes between release, with or without conditions, and detention. Using that Act's definition of release versus detention, Moreland was not entitled to credit on his sentence.

On June 30, 1991, the Government filed a petition for rehearing with suggestion for rehearing *en banc*. The

Eighth Circuit granted the government's petition and vacated the panel's decision. In a 7-5 decision filed June 30, 1992, the Eighth Circuit affirmed the decision of the circuit court, holding that Moreland was not in "official detention" within the meaning of 18 U.S.C. § 3585 (b), and there was no equal protection violation in treating presentence defendants differently from postdefendants. Slip op. 12. Circuit Judge Magill, writing for the majority, rejected the *Brown* Court's decision that BOP's interpretation of "official detention," was unreasonable. He argued that the BOP's Program Statement 5880.24 (5)(b)(5) was both a "reasonable and permissible construction of § 3585" for three reasons. Slip op. 6. First, the BOP made a clear and "reasoned" distinction between CTC's and jail-type facilities based on their respective degrees of restraint. *Id.* Second, the "great weight of the legal authority that has addressed this issue" has held that under the fact scenarios presented to the various courts to date, "official detention" does not include pretrial time spent at a CTC. Judge Magill points out that the First, Second, Fourth, Fifth, Seventh and Tenth Circuits have all decided that "official detention" does not include presentence residence in a CTC. He notes that the Ninth Circuit in *Brown*, is the only circuit in opposition to this position, and that even if *Brown* was correctly decided, Moreland's case would not apply "because the liberty restriction in *Brown* were greater that those placed on Moreland in RSCTC. Slip op. 8 quoting footnote 7.

The third reason that Judge Magill gives to support his argument that the BOP's interpretation of 18 U.S.C. § 3585 is reasonable, is by looking to the Bail Reform Act's distinction between release and detention. Slip op.

9. The majority argues that since Moreland was given a "conditional release" under 18 U.S.C. § 3142(a), and was not "detained" under the custody of the Attorney General, "consistency would require that the defendant also not be considered in "official detention" for the purposes of sentencing credit." Slip op. 9-10.

In a concurring opinion, Judge Loken discards Judge Magill's reliance on the reasonableness of the BOP's Program Statement 5880.24 (5)(b)(5) since the statement interpreted the undefined word "custody" in the former § 3568, which was replaced by the current § 3585 and the words "official detention."[1] Judge Loken suggests that because Congress included its own definition of detention in § 3142, the "Program Statement is no longer needed to determine whether a presentence order issued pursuant to § 3142 resulted in 'official detention.' " Slip op. 16. Judge Loken would hold that a "federal defendant

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[1] Section 3585 replaced 18 U.S.C. § 3585, which provided that defendant should receive credit for time spent "in custody" prior to commencement of his sentence. S. Rep. No. 225, 98th Cong., 2d Sess. 128-129, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3311-12. Congress "did not intend a different result" by replacing § 3568 with § 3585. *Id.* Since only time served in "official custody" under § 3568 could be credited against jail time, under § 3585 only time spent in "official detention" prior to commencement of the sentence could be credited. *U.S. v. Woods*, 888 F.2d 653, 655 (10th Cir. 1989), *cert. denied*, 110 S.Ct. 1301 (1990). *Woods* held that Congress intended to phrase "official detention" in former § 3585 to have the same meaning as the phrase "in custody" in former § 3568. This Court agreed with this analysis. Slip op. 5 quoting footnote 6. *See also Pinedo v. United States*, 955 F.2d 12, 16 (5th Cir. 1992); *United States v. Becak*, 954 F.2d 386, 387 (6th Cir. 1992); *United States v. Insley*, 927 F.2d 185, 186 (4th Cir. 1991).

is entitled to sentence credit under § 3585 for all the time spent under a presentence detention order pursuant to 18 U.S.C. 3142(i). Conversely, to the extent that the defendant has been released before trial under § 3142, no sentence credit may be allowed under § 3585(b) regardless of how restrictive the release conditions may have been." Slip op. 16. Judge Loken argues that this "bright line test" is "sensible as well as consistent with principles of statutory construction." *Id.*

In dissent, Senior Circuit Judge Heaney makes three arguments in support of Moreland's statutory interpretation of "official detention." He argues that the plain meaning and legislative history of 18 U.S.C. § 3585 do not reasonably support the BOP's exclusion of sentence credit for all pretrial detainees. Additionally, he argues that the degree of restraint on Moreland while at RSCTC is sufficient to constitute custody within the meaning or intent of the statute. Finally, he suggests that the Court's emphasis of the definition of the word detention in the Bail Reform Act is "misplaced" and doesn't focus on whether Moreland was "detained" within the meaning of 18 U.S.C. § 3585. Slip op. 22

Judge Heaney first argues that the term "official detention" is not "ambiguous" or "abstruse", and that even if the statute is ambiguous and open to some interpretation, "a degree of deference should be granted to the agency, though a reviewing court need not accept an interpretation which is unreasonable." Slip op.17 quoting *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 60 U.S.L.W. 4268, 4270 (U.S. 1992).

Judge Heaney argues that nothing in the statute or legislative history indicates that "official detention" should be construed narrowly or contrary to its "ordinary, contemporary, common meaning." Slip op. 18 quoting *Perrin v. United States,* 444 U.S. 37, 42 (1979). In addition and as the Supreme Court recently noted, the legislative history of the statute demonstrates that Congress has "continually *expanded*" the class of prisoners authorized to receive sentence credit for pretrial custody. Slip op. 18; *See also United States v. Wilson,* 60 U.S.L.W. 4244, 4247 (U.S. 1992). With this legislative guidance, Judge Heaney interpreted the words "official detention." He concluded that since RSCTC acted as an "agent of the criminal justice system," the term "official" must apply to Moreland's 150 day detention at RSCTC. Additionally, the ordinary definition of detention is a "period of temporary custody prior to disposition by a court," and therefore Moreland's custody at RSCTC must be considered "detention." Slip op. 19.

Judge Heaney's second argument focuses on whether Moreland's degree of restraint was great enough to constitute custody within the meaning of the statute. In reviewing the record, he explains how RSCTC, acting as an agent for the criminal justice system, "subjected Moreland to 24-hour supervision and physically incarcerated him for a substantial part of each day for 150 days." Slip op. 22. Additionally, for part of his confinement, these conditions exceeded those in *Brown v. Rison.* For these reasons, as well as those set forth in examining the ordinary meaning of "official detention," Judge Heaney concluded that to "deny [Moreland] sentence credit is

unreasonable and contrary to the considerations of fairness that inspired Congress' decision to provide credit for time served." Slip op. 222 quoting *Brown*, 895 F.2d at 536.

Finally, Judge Heaney argues that focusing attention on the meaning of "detention" in 18 U.S.C. § 3142, and using that as a basis for defining "official detention" in 18 U.S.C. § 3585, turns the Court's attention away from the real issue. The issue at hand, he argues, is "not whether Moreland was detained within the meaning of the Bail Reform Act, but whether the time he served in custody at the Center as 'official detention' under 18 U.S.C. § 3585(b)(1)." Slip op. 22. It is the degree of restraint provided by a CTC that is the "operative question," and the "court's discussion of the Bail Reform Act is a non sequitur." *Id.*

REASONS FOR GRANTING THE WRIT

I. Moreland's Pretrial Detention at a Community Treatment Center was "Official Detention" within the Plain Meaning and Legislative History of 18 U.S.C. § 3585, and the Bureau of Prisons' Interpretation of "Official Detention" expressed in its Program Statement is Unreasonable.

The decision by the Eighth Circuit on rehearing *en banc* in *Moreland* solidified the split among the circuits as to what degree of restraint is required to be considered in "official detention" within the meaning of 18 U.S.C. § 3585. Prior to this decision the circuits were already split as to whether time spent in pretrial detention at a community treatment center ("CTC") was considered

"official detention" and required sentence credit. This split has now been magnified and should be addressed by this Court.

The Eighth Circuit relied on the Bureau of Prisons' ("BOP") interpretation of "official detention" and the interpretation given by three other circuits to find that the BOP's Program Statement 5880.24 (5)(b)(5) is a reasonable construction of § 3585. The Eighth Circuit's decision does not resolve the split between the circuits. Instead the decision in *Moreland* is now in direct conflict with established law in the Ninth Circuit. The Eighth Circuit correctly decided that for purposes of examining the BOP's Program Statement, the definition given by the BOP of "custody" in 18 U.S.C. § 3568 applies equally to that of "official detention" in 18 U.S.C. § 3585, which replaced § 3568. However, the Eighth Circuit incorrectly decided that the statute was ambiguous, requiring absolute deference to the administrative agencies interpretation. The plain meaning and legislative history of § 3585 strongly suggest that "official detention" includes the pretrial detention circumstances found in *Moreland*.

a. This Court Should Resolve a Split Among the Circuits as to Whether the Plain Meaning of "Official Detention" Within 18 U.S.C. § 3585 Supports the Bureau of Prisons' Interpretation Set Forth in Program Statement 5880.24 (5)(b)(5).

This Court has not ruled on the statutory construction of 18 U.S.C. § 3585, which controls the calculation of a federal prisoner's sentence. However, it has clearly set forth the rules for statutory construction. This Court has

held that if a statute is "silent or ambiguous with respect to the specific issue," and if "the [administering] agency's answer is based on a permissible construction of the statute," the agency's interpretation must be given deference. *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984). However the rule in *Chevron* is not absolute. This Court has also held that although the construction of a statute by an agency charged with administering it is entitled to substantial deference, "[c]ourts are the final arbiters of statutory interpretation." *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.,* 454 U.S. 27, 31-32 (1981). A court must reject any administrative construction which is "contrary to clear congressional intent," or which is not faithful to the plain language or meaning of a statute. *Demarest v. Manspeaker,* 111 S. Ct. 599, 603 (1991). Even though *Chevron* established that a "degree of deference is granted to [an] agency," this court has clearly established that a "reviewing court need not accept an interpretation [that] is unreasonable." *National Railroad Passenger Corp. v. Boston & Maine Corp.,* 60 U.S.L.W. 4268, 4270 (U.S. 1992). A court's deference is thus neither blind nor absolute, and the Eighth Circuit had the authority to determine the reasonableness of the BOP's interpretation of "official detention."

This Court has further held that based on the plain language of the statute, "official detention" must take on its "ordinary, contemporary, common meaning, unless otherwise defined." *Perrin v. United States,* 444 U.S. 37, 42 (1979). It is here that *Moreland* has now joined the Fifth, Seventh and Tenth Circuits in arguing that the BOP's interpretation of "official detention" is reasonable, and

requires deference under *Chevron*. Slip op. 6-8. However, the Eighth Circuit and those that it has now joined, did not undergo the analysis required by *Perrin* and *Demarest*. Since "official detention" was not defined by Congress in § 3585, its "ordinary" and "contemporary" meaning must be applied in a court's interpretation. The Ninth Circuit, in *Brown v. Rison*, 895 F.2d 533 (9th Cir. 1990), underwent that exact analysis in its statutory interpretation. It found that excluding forced residence at a CTC, like the BOP's Program Statement presently requires for the purpose of sentence credit, under conditions approaching incarceration, as depicted in *Brown*, would be "contrary to the considerations of fairness" underlying Congress' provision of credit for time served. *Id.* at 536. The Ninth Circuit found that the ordinary and plain meaning required sentence credit, and that the BOP's interpretation was unreasonable. Judge Heaney's dissent also examined the "ordinary meaning of the words at issue," and found that anything short of granting Moreland sentence credit under his conditions, which approached incarceration, would be an "unreasonable" construction of § 3585.

This split in the circuits falls squarely on the varying interpretations of the words "official detention," or "custody" in the former § 3568. In *United States v. Smith*, 869 F.2d 835 (5th Cir. 1989), the Fifth Circuit refused to find the prisoner entitled to credit for six months he had spent in a Salvation Army halfway house where he was merely required to undergo urinanalysis twice a week, call his probation officer and remain in the Northern District of Texas. *Id.* at 837. The court concluded that these conditions were no more stringent than those when Mr. Smith was free on bond or probation. *Id.* However, even though

these conditions are not considered approaching those of incarceration, as in *Brown* and *Moreland*, the court went on to adopt an absolute rule that since "custody" under § 3568 was characterized by incarceration, "official detention" under any conditions but those of a jail could not be credited to a prisoner's sentence.

In *Ramsey v. Brennan*, 878 F.2d 995 (7th Cir. 1989), the Seventh Circuit followed the Fifth Circuit, even though the court acknowledged that "[t]o a normal English speaker, . . . being forced to live in a halfway house is to be held in 'custody.' " *Id.* at 996. The Seventh Circuit did not exam the degree of restraint imposed on Mr. Ramsey at the halfway house, but concluded that such a question was not "susceptible to rational determination, at least by the tools of inquiry available to a judge," and simply deferred to the Bureau's Policy Statement. *Id.* Such absolute deference is anathema to this Court's holding in *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 60 U.S.L.W. 4268, 4270 (U.S. 1992).

In *United States v. Woods*, 888 F.2d 653 (10th Cir. 1989), *cert. denied*, 110 S.Ct. 1301 (1990), the Tenth Circuit relied on *Ramsey v. Brennan* and earlier cases denying credit for time spent *free* on bond, and found that Mr. Woods' forced residence at a halfway house was not "custody" for the purposes of sentence credit. *Id.* at 656. The facts before the court showed that Mr. Woods resided at the halfway house during the week, but was free to go home on weekends. *Id.* at 654. These conditions, the Tenth Circuit concluded, did not "equal the deprivation of liberty experienced by a person incarcerated in a jail facility." *Id.* at 656. However the court, following the broad

brush reasoning of the Fifth Circuit, and held that "official detention" means "imprisonment in a place of confinement, not stipulations or conditions imposed upon a person not subject to full physical incarceration." *Id.* at 655. Ignoring the specific fact scenario presented in *Woods*, the court went on to hold any presentence detention in a halfway house could not be used for sentence credit. *Id.*

Similarly, in *Villiaume v. United States Department of Justice*, 804 F.2d 498, 499 (8th Cir. 1986), *cert. denied*, 481 U.S. 1022 (1987), the Eighth Circuit in an earlier decision, held that a prisoner seeking credit for time released on bail subject to travel and reporting conditions was not considered "custody" for the purposes of § 3568. In a giant leap, which was disavowed by the panel court's decision in *Moreland v. United States*, 932 F.2d 690 (8th Cir. 1991), *reh'g granted, opinion and judgment vacated*, the Eighth Circuit also found that "custody" under § 3568 "relates to actual custodial incarceration." *Id.* at 499.

The cases that have defined this issue in the Fifth, Seventh, and Tenth Circuits have all used fact scenarios that fall far short of approaching conditions of incarceration for the purpose of defining all instances of "official detention," including all types of forced residence at a CTC. This approach is disingenious, and directly conflicts with that taken by the Ninth Circuit in *Brown*, and Fourth Circuit in *United States v. Insley*, 927 F.2d 185 (4th Cir. 1991), and by Judge Heaney in his dissent.

In *Brown*, the petitioner's conditional release required that he "reside at the center, and . . . be present at the center from 7 p.m. to 5 a.m. every day, without outside

contact. In addition, he was ordered to follow all the rules and regulations of the center, including drug testing. He was also required to maintain his employment, and travel was restricted to a three county area." *Brown v. Rison*, 895 F.2d 533, 536 (9th Cir. 1990).

The *Brown* panel carefully studied the restrictions placed on Brown. The court agreed that the restrictions on Brown, were " 'simply too close to incarceration to permit a distinction for the purposes of credit against his sentence' when residents were subject to its regulations, to drug testing, to curfews and to work agreements." *Id.* The Ninth Circuit recognized that a defendant subject to conditions of release is not automatically entitled to sentence credit. Only those defendants released under conditions closely approaching or equaling incarceration would be considered for sentence credit.

The Ninth Circuit, since its decision in *Brown*, has established a clear rule for granting credit under § 3585, crediting only sentences that approach conditions of incarceration like those in *Brown*. In *United States v. Freeman*, 922 F.2d 1393 (9th Cir. 1991), the defendant sought credit for the time pretrial, during his trial, and appeal, when he had remained free on bail in the amount of zero dollars under the supervision of Pretrial Services. During part of that time, Mr. Freeman was even permitted to travel in California and Hawaii for business and pleasure. *Id.* at 1394. Presented with these facts, the Ninth Circuit found no basis for Mr. Freeman's claim to credit. The court first noted that the holding in *Brown* allowed credit only for time served in pretrial *custody* at a drug treatment center. *Id.* at 1397. In addition, the Court found no

evidence that Mr. Freeman's "conditions of release were akin to those imposed in *Brown*," *Id.*

District courts within the Ninth Circuit have also distinguished *Brown*, recognizing its application only to restrictive conditions comparable to those imposed on Brown, and not in other circumstances. In *United States v. Anderson*, 1991 U.S. Dist. Lexis 4792, the court ruled that Mr. Anderson was not entitled to sentence credit for 34 days he had spent at home awaiting trial, even though he was electronically monitored during this time. *Id.* at 1-2. The court distinguished *Brown* as follows:

> It is clear that the compelling logic of the *Brown* opinion derived from the character of the restrictive institutional environment of the community treatment center to which Brown was involuntarily committed. Anderson, on the other hand, was not extruded from his home, nor forced to abide by any rules of conduct except his own, nor subjected to regular drug testing, nor deprived of outside contact. *Id.* at 9.

See also *Malosh v. Crabtree*, 758 F. Supp. 620 (D. Or. 1991) (no credit for time defendant was confined to army base as condition of pretrial release, while he was on active status in United States Army). As these cases demonstrate, the *Brown* standard for pretrial credit has afforded courts in the Ninth Circuit a sounds basis for sifting the wheat from the chaff.

This is the exact approach taken by the fourth Circuit. In *United States v. Insley*, 927 F.2d 185 (4th Cir. 1991), the court denied taking the all-or-nothing approach taken by *Smith, Ramsey* and *Woods*. In *Insley*, the defendant was released on an appeal bond. She was not placed in the

custody of a treatment center, but was released to her parents' home, where she was free to associate with her family and friends, although she was electronically monitored and had a 9 P.M. curfew. *Id.* Under these circumstances, the Fourth Circuit refused to grant sentence credit for Ms. Insley's time.

However, the Fourth Circuit did not disagree with the Ninth Circuit and Eighth Circuit prior to the panel decision being vacated, because *Brown* and *Moreland* "involved conditions more restrictive than the conditions of Insley's appeal bond." *Id.* at 187. In examining the ordinary meaning of "official detention" within the context of cases already presented to various courts of appeal, the *Insley* court decided that it was not enough to be subject to some conditions, such as electronic monitoring, a requirement to live with one's parents, and a curfew. *Id.* at 186. The defendant must also be in an institution and be subject to that institutions jail-like rules, as in *Moreland* and *Brown*. 895 F.2d at 534, 536. *Id.* The Fourth Circuit did not absolutely define "official detention," but instead like *Brown* gave it an ordinary and contemporary meaning.

Interestingly enough, on June 12, 1991, a 3-0 decision by the Eighth Circuit reconfirmed its reliance on panel's interpretation of § 3585 by granting 26 days sentence credit to Mr. Beston in *United States v. Beston*, 936 F.2d 361 (8th Cir. 1991). This panel, adopting the approach in *Brown* and *Insley*, held that only those defendants released "under highly restrictive conditions will be entitled to sentence credit." Slip Op. at 4, quoting *Moreland*.

The Eighth Circuit refused to follow this structured approach. The majority clearly stated that "*Brown* was wrongly decided" and that the Ninth Circuit's interpretation of the BOP Program Statement is incorrect." Slip op. 8. The Eighth Circuit decided to adopt the 'broad brush' approach taken by the Fifth, Seventh and Tenth Circuits in determining the reasonableness of the construction of § 3585. Judge Magill stressed the fact that the BOP's Program Statement "makes allowance for 'conditions approaching those of incarceration,'" because it considers both the "type of facility and the amount of restraint imposed." *Id.* He concluded that this consideration by BOP "answers the Ninth Circuit's concerns." *Id.* However, the mere fact that the BOP has addressed this issue does not make it a reasonable interpretation. Furthermore, the fact that three circuits hold that "official detention" means full physical incarceration is not reason to ignore the reasonableness issue. Those circuits took a leap of faith that the Ninth Circuit and Fourth Circuit were not willing to take in deferring to the BOP's interpretation. This Court should grant the petitioner's writ to resolve this split in the circuits, and find that the BOP's unreasonable exclusion of forced residence at a CTC falls within the plain meaning of "official detention" within 18 U.S.C. § 3585.

b. This Court Should Resolve a Split Among the Circuits as to Whether the Legislative History of "Official Detention" Within 18 U.S.C. § 3585 Supports the Bureau of Prisons' Interpretation Set Forth in Program Statement 5880.24 (5)(b)(5).

The legislative history of § 3585 further supports the *Brown* court's conclusion that the Bureau's interpretation of "official detention" is unreasonable, and that the split between the circuits should be resolved by this Court. This Court established that if a court considers the language of a statute unclear, it may then look to the legislative history of the statute for evidence of its intended meaning. *Blum v. Stenson,* 465 U.S. 886, 896 (1984). An examination of the legislative history of 18 U.S.C. § 3568 reveals no congressional intent to define "custody" narrowly, as does the Bureau's Program Statement. Indeed, through the course of two amendments to the original §3568, Congress has continually expanded the class of prisoners authorized to receive sentence credit for pretrial custody.

The original version of 18 U.S.C. § 3568 did not mention sentence credit for pretrial custody. The purpose of the original statute was simply to fix the date when a sentence of imprisonment began to run. Act of June 29, 1932, ch. 310, § 1, 47 Stat. 381 (1932). In that original version, Congress left the awarding of credit for pretrial custody up to the discretion of the sentencing judge.

In 1960, Congress amended § 3568 and, for the first time, mentioned pretrial custody. The amended version of § 3568 provided, in relevant part:

> The Attorney General shall give any such person [convicted of an offense] credit towards service of his sentence for any days spent in custody prior to the imposition of sentence by the sentencing court for want of bail set for the offense under which sentence was imposed where the statute requires the imposition of a minimum mandatory sentence.

Act of Sept. 2, 1960, Pub. L. No. 86-691, § 1(a), 74 Stat. 738 (1960). The amendment was intended to eliminate certain inequities in the application of the original § 3568. H.R. Rep. No. 2058, 86th Cong., 2d Sess. 2, *reprinted in* 1960 U.S. Code Cong. & Admin. News, 3288, 3289.

Under the original § 3568, whenever the conviction called for a mandatory minimum sentence, the judge could not reduce the sentence to compensate for pretrial custody. Thus, a defendant who was free on bail, and who later received a mandatory minimum sentence, actually served a shorter sentence than a pretrial detainee sentenced to the same mandatory minimum. *Id.* To remedy this inequity, the 1960 amendment to § 3568 expressly granted credit for pretrial custody to all prisoners who remained in custody for lack of bail and who then were sentenced to a mandatory minimum term. In all other circumstances, credit for pretrial custody continued to be awarded at the discretion of the sentencing judge. *Id.*

In 1966, Congress again expanded the class of prisoners authorized to receive sentence credit for pretrial custody, this time making it mandatory for *all* sentenced prisoners, not just those who had been held without bail and later received a mandatory minimum sentence. Bail Reform Act of 1966, Pub. L. 89-465, 80 Stat. 216 (1966).

The purpose of this expanded version of § 3568 was to assure that persons "not needlessly be detained," and that they received credit for all "time spent in custody prior to trial." H.R. Rep. No. 1541, 89th Cong., 2nd Sess. 2, *reprinted in* 1966 U.S. Code Cong. & Admin. News, 2293, 2295.

This expanded version of § 3568 was adopted by the Crime Control Act of 1984 and replaced by 18 U.S.C. § 3585. S. Rep. No. 225, 98th Cong.2d. Sess. 128-129, *reprinted in* 1984 U.S. Code Cong. & Admin. News, 3182, 3311-3312. Congress unequivocally declared that § 3585 did not intend a "different result" from the old § 3568 because only "official detention" could be credited against jail time. *Id.* The legislative history of § 3585 does not indicate that "official detention" should be narrowly defined. *Id.*

Nothing in the legislative history of either the 1960 or 1966 amendments to § 3568, or § 3585, indicates that "official detention" should be narrowly defined or given a noncustomary meaning. The Bureau's constricted definition of "official detention" undercuts the congressional intent apparent in these amendments. This Court recently noted Congress' intent to enlarge the class of defendants eligible to receive credit in 1984 when it replaced § 3568 with § 3585. *See United States v. Wilson,* 112 S.Ct. 1351, 1354 (1992). By replacing "custody" with "official detention," Congress decided to use more "precise" language. Slip op. 19 (referring to *Ramsey v. Brennan,* 878 F.2d 995, 996 (7th Cir. 1989)(construing former § 3568) ("[t]he word [custody] is a chameleon.").

The Eighth Circuit, by joining the Fifth, Seventh and Tenth Circuits, has enlarged the on-going split between the circuits in interpreting the plain meaning and legislative history of "official detention" in § 3585. The real conflict is between those circuits, which, without clear examination or analysis, defer to the Bureau's unreasonable interpretation of the "official detention" requirement of § 3585 to deny credit for *any* or *all* pretrial time spent in a treatment center, no matter how restrictive the conditions, and those that would grant credit under conditions of release approaching incarceration. Under any reasonable reading of § 3585 and a thorough examination of Congressional intent to expand the class of prisoner's receiving sentence credit, a prisoner deprived of his liberty to such a degree as was Robert Scott Moreland must be entitled to sentence credit for time spent in a treatment center. The *Brown* court did not "incorrectly decline to defer to the BOP's interpretation as it was required to do under *Chevron*." Slip op. 8. Instead it examined the BOP's interpretation of "official detention" and found it unreasonable under *Brown's* conditions. Only then, as set forth by this Court in *National Railroad Passenger Corp.*, did it decide not to defer to the BOP's unreasonable interpretation. "Official detention" must be given its ordinary and contemporary meaning for purposes of sentence credit. This Court should grant this petition to resolve this split in statutory construction amongst the circuits.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that the writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Dated: September 11, 1992

Respectfully submitted

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 90-5375MN

Robert Scott Moreland, a/k/a Robert S. Moreland, a/k/a "Bobby", Appellant,	*	Appeal from the United States District Court for the District of Minnesota.
v.	*	
United States of America, Appellee.	*	

Submitted: January 6, 1992

Filed: June 30, 1992

Before LAY, * Chief Judge, HEANEY, Senior Circuit Judge, McMILLIAN, RICHARD S. ARNOLD, ** JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, and HANSEN, Circuit Judges, En Banc.

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* The Honorable Donald P. Lay was Chief Judge of the United States Court of Appeals for the Eighth Circuit at the time this case was submitted and took senior status on January 7, 1992, before the opinion was filed.

** The Honorable Richard S. Arnold became Chief Judge of the United States Court of Appeals for the Eighth Circuit on January 7, 1992.

MAGILL, Circuit Judge, with whom FAGG, BOWMAN, WOLLMAN, BEAM, and HANSEN, Circuit Judges, join.

The issue in this case is whether a presentence defendant held in a halfway house should receive credit, post-conviction, on his sentence under 18 U.S.C. § 3585(b) (1988). Robert Scott Moreland appealed the district court's [1] denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2255. A divided panel of this court reversed and remanded with instructions to credit Moreland for time spent at the halfway house. *Moreland v. United States*, 932 F.2d 690 (8th Cir.), *vacated, reh'g en banc granted sub nom. United States v. Moore*, Nos. 90-2534, 90-2535, 90-2985, 90-5375 (8th Cir. July 29, 1991). We granted rehearing en banc. We now fall in line with the First, Second, Fourth, Fifth, Seventh and Tenth Circuits, and reject the reasoning of the Ninth Circuit. We find that Moreland was not in official detention while at the halfway house, and affirm the district court.

I.

The background facts of this case are more fully set out in the panel opinion, *Moreland*, 932 F.2d 690, and we will not repeat them here except as necessary to address the arguments on appeal.

Moreland was arrested on July 28, 1989, on two counts of bank fraud, in violation of 18 U.S.C. § 1344, and two counts of using false social security cards, in violation of 18 U.S.C. § 408(g)(2). Moreland was released on

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[1] The Honorable Donald D. Alsop, Chief Judge, United States District Court for the District of Minnesota.

bond on September 5, 1989. He was ordered to reside at the Reentry Services Community Treatment Center (RSCTC) pending trial. On October 30, 1989, Moreland pleaded guilty to one count of fraud. He continued to reside at RSCTC prior to his sentencing. [2] After beginning to serve his sentence in federal prison, Moreland filed a petition with the Bureau of Prisons (BOP) requesting that he be given credit against his sentence for the time he spent at RSCTC prior to sentencing. BOP denied his request. Moreland then filed a petition in federal district court asking for habeas relief. The district court denied the petition because it determined that Moreland was not in "official detention" while at RSCTC. Moreland appeals to this court on two grounds. First, Moreland contends that he was in "official detention" under 18 U.S.C. § 3585(b) (1988) [3] while he resided at RSCTC. Second, Moreland argues that denial of credit for his presentence "detention" violates the equal protection clause because

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[2] Moreland was sentenced on February 2, 1990. He actually resided at RSCTC until March 12, 1990, when he began serving his sentence at a federal prison. Only the time between September 5, 1989, and February 2, 1990, is at issue in this case. Therefore, all allusions in this opinion to the time Moreland spent at RSCTC will refer specifically to the time *prior to sentencing*.

[3] Section 3585(b) provides:

> (b) **Credit for prior custody.** – A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in *official detention* prior to the date the sentence commences–
>
> (1) as a result of the offense for which the sentence was imposed, . . .
>
> that has not been credited against another sentence.

18 U.S.C. § 3585(b) (emphasis added).

postsentence detainees [4] residing at RSCTC receive credit for their time at RSCTC.

II.

A. "Official Detention"

Moreland's first argument hinges on the definition of "official detention" under § 3585(b). If "official detention" includes presentence residence in a halfway house, Moreland should get credit for the time he spent at RSCTC. If, however, such time does not fall under the definition of "official detention," the district court was correct and Moreland should not get credit for that time.

The term "official detention" is ambiguous. Congress did not provide a clear definition in either the statute or in its legislative history. *See* 18 U.S.C. § 3585(b); S. Rep. No. 225, 98th Cong., 2d Sess. 128-29, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3312. The disagreement among the circuits over the interpretation of this phrase emphasized its abstruseness. *Compare, e.g., United States v. Woods*, 888 F.2d 653, 655 (10th Cir. 1989) (" 'official detention' means imprisonment in a place of confinement, not stipulations or conditions imposed upon a person not subject to full physical incarceration"), *cert. denied*, 494 U.S. 1006 (1990), *with Brown v. Rison*, 895 F.2d 533 (9th Cir. 1990) ("official detention" can include pretrial residence in community treatment center where conditions approached those of

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[4] At this point, the criminal defendant or detainee is more properly referred to as "prisoner" or "inmate", but to simplify the discussion, we will use the phrase "postsentence defendant" or "postsentence detainee."

incarceration). Because the phrase is ambiguous, we must look outside the statute to determine its parameters. [5]

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Supreme Court held that if a statute is "silent or ambiguous with respect to the specific issue," and if "the [administering] agency's answer is based on a permissible construction of the statute," we must defer to the agency's interpretation.

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[5] The concurrence suggests that the word "detention" in § 3585(b) "incorporates the definition contained in § 3142." *See infra*. Section 3142 delineates the circumstances under which a federal judge may order that a federal prisoner be detained before trial. We agree that the term "detention" as applied in § 3142 is incorporated in the phrase "official detention" in § 3585(b). *See infra* pp. 8-9. We believe this result is dictated both by the role of § 3142 and its application in the federal judicial system, and by our previous decisions under § 3568, *see infra* p. 5 n. 6, requiring actual physical incarceration for a prisoner to receive credit. *See United States v. Carlson*, 886 F.2d 166, 166 (8th Cir. 1989); *Villaume v. United States Dep't of Justice*, 804 F.2d 498, 499 (8th Cir. 1986), *cert. denied*, 481 U.S. 1022 (1987).

We do not believe, however, that acknowledging the role played by § 3142 ends our inquiry. There are situations, not before us now, that § 3142 does not address. One example is a defendant who spends time in state custody on a charge that evolves into a federal offense. *See infra* p. 10 n. 10. We believe that the existence of such cases shows that the phrase "official detention" in § 3585(b) is ambiguous.

The concurrence states "the Bureau of Prisons retains the discretion to determine, in the first instance whether time spent in presentence custody not controlled by the federal trial court under § 3142 rises to the level of 'official detention' for purposes of § 3585(b)." *Infra* p. ___ n. 6. Absent some evidence that Congress intended such a result, however, we will not create a dual system of authority to govern grants of credit for presentence detention.

The BOP, as administering agency, resolved this ambiguity in its Program Statement on Sentence Computation, Jail Time Credit Under 18 U.S.C. § 3568. [6]

> Time spent in residence in a *residential community center* (or a community based program located in a Metropolitan Correctional Center or jail) . . . as a condition of bail or bond . . . is not creditable as jail time since the degree of restraint provided by residence in a community center is not sufficient restraint to constitute custody within the meaning or intent of 18 USC 3568. . . . However, time spent in a *jail-type*

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[6] 18 U.S.C. § 3585 replaced 18 U.S.C. § 3568. Section 3568 uses the term "custody" instead of "official detention." There is no indication that Congress intended to change the application of the statute for purposes of granting credit on a prisoner's sentence. *See* S. Rep. No. 225, 98th Cong., 2d Sess. 128-29, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3311-12. "Subsection (b) provides that the defendant will receive credit towards the sentence of imprisonment for any time he has spent in *official custody*. . . . " *Id.* at 3312 (emphasis added). In *Woods*, 888 F.2d 653, the court said that "Congress did 'not intend a different result' from the old statute because only time served in 'official custody' could be credited against jail time." *Id.* at 655. We agree with this analysis. *See also Pinedo v. United States*, 955 F.2d 12, ___ (5th Cir. 1992); *United States v. Becak*, 954 F.2d 386, 387 (6th Cir. 1992); *United States v. Insley*, 927 F.2d 185, 186 (4th Cir. 1991).

The concurrence argues that *United States v. Wilson*, ___ U.S. ___, 60 U.S.L.W. 4244 (Mar. 24, 1992), forecloses our finding that the term "official detention" means the same thing as the term "custody." We disagree. The statement cited is *dicta* and does not find that this change is meaningful. It simply remarks that the statute was changed in several ways. *Id.* at 4246-47. We do not think this precludes our approach here. We find, therefore, that the term "custody" under § 3568 means the same thing as the phrase "official detention" under § 3585.

> *facility* (not including a community based program located in a Metropolitan Correctional Center or jail) as a condition of bail or bond is creditable as jail time because of the greater degree of restraint.

BOP Program Statement 5880.24(5)(b)(5) (emphasis in original). We believe this is both a reasonable and a permissible construction of § 3585 for a number of reasons.

First, the BOP makes a clear distinction between residential community centers and jail-type facilities based on their respective degrees of restraint. It explicitly grants sentencing credit when a presentence defendant is placed under a great degree of restraint. Thus, it is clear that the BOP has considered this issue and has made a reasoned determination.

Second, the great weight of the legal authority that has addressed this issue supports the conclusion that "official detention" does not include presentence residence in a halfway house. In *Ramsey v. Brennan*, 878 F.2d 995 (7th Cir. 1989) (interpreting § 3568), the Seventh Circuit refused to grant sentence credit for time spent in a halfway house. The court opined that whether the deprivation of liberty associated with confinement in a halfway house, a "twilight zone between prison and freedom," qualifies as "official detention" was not "a question susceptible of rational determination, at least by tools of inquiry available to judges." *Id.* at 996. Instead of making such a determination, the court deferred to the BOP Program Statement that prohibits using time spent in a residential community center as credit toward jail

time. *Id.* (quoting BOP Program Statement No. 5880.24(5)(b)(5)).

In *United States v. Woods*, 888 F.2d 653 (10th Cir. 1989) (interpreting § 3585(b)), *cert. denied*, 494 U.S. 1006 (1990), the Tenth Circuit reached the same result without relying on the BOP Program Statement. The *Woods* court held that "official detention" means "imprisonment in a place of confinement, not stipulations or conditions imposed upon a person not subject to full physical incarceration." *Id.* at 655. Consequently, the court held that presentence detention in a halfway house could not be used for sentence credit. *Id.*

The Fourth Circuit, following *Woods*, found that "official detention" requires full physical incarceration. *United States v. Insley*, 927 F.2d 185, 186 (4th Cir. 1991); *see also United States v. Zackular*, 945 F.2d 423, 424-25 (1st Cir. 1991) ("official detention" requires incarceration as a precondition to credit); *Mieles v. United States*, 895 F.2d 887, 888 (2d Cir. 1990) ("jail-time credit under section 3568 requires physical confinement"); *United States v. Smith*, 869 F.2d 835, 837 (5th Cir. 1989) ("custody" under § 3568 is characterized by incarceration) (quoting *Polakoff v. United States*, 489 F.2d 727, 730 (5th Cir. 1974)). Our own circuit has also found that "custody" under § 3568 "relates to actual custodial incarceration." *Villaume v. United States Dep't of Justice*, 804 F.2d 498, 499 (8th Cir. 1986), *cert. denied*, 481 U.S. 1022 (1987).

Only one circuit has decided that actual incarceration is not necessary for credit to be granted under § 3568. In *Brown v. Rison*, 895 F.2d 533 (9th Cir. 1990), the Ninth Circuit granted jail-time credit for pretrial residence in a

halfway house. It concluded that the BOP interpretation "excludes [from sentencing credit] enforced residence under conditions approaching those of incarceration." *Id.* at 536. Although the court recognized that it "must accord substantial deference to an interpretation of section 3568 by the agency charged with its administration, and must accept that interpretation if it is a reasonable one," *id.* at 535, it went on to decide that excluding enforced residence under conditions approaching incarceration would be contrary to the considerations of fairness underlying Congress' provision of credit for time served. *Id.* at 536. We think *Brown* was wrongly decided.

The Ninth circuit's interpretation of the BOP Program Statement is incorrect. The Statement clearly says that "time spent in a *jail-type facility* (not including a community based program located in a Metropolitan Correctional Center or jail) as a condition of bail or bond is creditable as jail time because of the greater degree of restraint." BOP Program Statement 5880.24(5)(b)(5) (emphasis in original). This provision makes allowance for "conditions approaching those of incarceration" because it takes into account both the type of facility and the amount of restraint imposed. Thus, the BOP interpretation actually answers the Ninth Circuit's concerns. Second, the fact that the great weight of legal authority has decided that "custody" or "official detention" require physical incarceration indicates that this interpretation is reasonable. Therefore, we believe that the Ninth Circuit

incorrectly declined to defer to the BOP interpretation as it was required to do under *Chevron*.[7]

Third, other relevant statutes indicate that Moreland was not in detention when he resided at RSCTC, but rather was granted a conditional release. Presentence defendants who are permitted to reside in a halfway house are not in detention under the Release and Detention Pending Judicial Proceedings chapter of the U.S. Code. 18 U.S.C. §§ 3141-3156 (1988). At a criminal defendant's first appearance before a judicial officer after arrest, the defendant is either detained or released (with or without conditions). 18 U.S.C. § 3142(a). If the defendant is detained, the detention order must include language that directs that the defendant be "committed to the custody of the Attorney General for confinement in a corrections facility. . . . " 18 U.S.C. § 3142(i)(2).[8] If the defendant is released, however, the judicial officer must

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[7] Even if *Brown* were correct, however, it would not apply in this case because the liberty restrictions in *Brown* were greater than those placed upon Moreland in RSCTC. In *Brown*, the curfew lasted from 7:00 p.m. to 5:00 a.m. and during that time the prisoners were allowed no outside contact. In contrast, Moreland's curfew lasted from midnight to 8:00 a.m. with limited phone privileges. While Moreland was subject to some of the restrictions present in *Brown* – no drugs, no alcohol, drug testing, and limited travel – Moreland still had much more liberty in RSCTC than he would have had in jail.

[8] The fact that a detained defendant is committed to the custody of the Attorney General and a released defendant is not is [sic] particularly important. "There exists a strong presumption that 'custody' refers to the legal authority of the custodian. . . . The physical conditions to which federal inmates are subjected vary widely. . . . The only common link among all those settings is that the inmates are always subject to the authority of the Attorney General." *Randall v. Whelan*, 938 F.2d 522, 525 (4th Cir. 1991).

impose the "least restrictive" conditions that "will reasonably assure the appearance of the person as required and the safety of any other person and the community. . . . " 18 U.S.C. § 3142(c)(1)(B). The most restrictive form of release the officer can impose requires, *inter alia*, the defendant to "remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court. . . . " 18 U.S.C. § 3142(c)(1)(b)(i). When a presentence defendant is released to a halfway house, he is placed in the custody of the proprietors of the halfway house, not the Attorney General, and therefore is not is detention.[9] Consistency would require that the defendant also not be considered in "official detention" for purposes of sentencing credit.[10]

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[9] It is important to note that, when determining the conditions of release, the judicial officer must maintain the presumption of innocence of the presentencing defendant. 18 U.S.C. § 3142(j). Once a defendant has been found guilty of a crime, the presumption of innocence is replaced by a presumption of detention. This presumption, however, can be overcome. *See* 18 U.S.C. 3143(a). If a presentencing defendant has been found guilty and remains in a halfway house without a transfer of custody to the Attorney General, then it is clear that the presumption of detention has been overcome and the presentencing defendant is still on conditional release.

[10] We do not believe § 3142 governs the definition of the word "detention" in § 3585(b) because it does not cover all cases where credit should be granted. Consider, for example, a defendant who spent time in state custody on a charge that evolved into a federal offense. This situation seems to us to fall within the term "official detention." The legislative history of § 3568 specifically provided that a defendant should receive credit for such time. H.R. Rep. No. 1541, 89th Cong., 2d Sess., *reprinted in* 1966 U.S.C.C.A.N. 2293, 2306; *see also Wilson*, 60 U.S.L.W. 4244 (assuming credit under § 3586(b)). Yet this defendant would not

B. Equal Protection

Moreland also argues that BOP's denial of sentence credit for his presentence detention in RSCTC violated the equal protection clause because other prisoners received credit for their time at RSCTC. Presentence defendants are not a suspect class. Therefore, we review Moreland's equal protection argument under a rational basis standard. *See Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-41 (1985). Under this standard of review, Moreland prevails if (1) persons who are similarly situated are treated differently by the government, and (2) the government fails to provide a rational basis for the dissimilar treatment. *Id.*

Moreland contends that the district court should have adopted the Eleventh Circuit's approach in *Johnson v. Smith*, 696 F.2d 1334 (11th Cir. 1986). In *Johnson*, the court stated that treating presentence defendants and postsentence defendants differently would not violate the Constitution if (1) conditions for presentence defendants were less restrictive than for postsentence defendants, or (2) the government had a rational reason for the disparate treatment of the two *similarly situated* groups. *Id.* at 1337 (emphasis added). However, the *Johnson* court was not required to and did not consider the antecedent question of whether presentence defendants and postsentence defendants are similarly situated because the government

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receive credit if § 3142 governed. Absent contrary evidence, we will not assume that Congress intended to create such an inequity between federal defendants – an inequity that results solely from the accident of where a defendant was first incarcerated for an offense.

had conceded they were in the district court. *Id.* at 1338. Moreland does not have the benefit of such a concession in this case. We find that the *Johnson* holding does not apply to this case because presentence defendants and postsentence defendants are legally distinct from one another and, therefore, are not similarly situated. *See Woods*, 888 F.2d at 656 (as a matter of law, presentence defendants and postsentence defendants are not similarly situated because of divergent legal status).

Presentence defendants in a halfway house have a different legal custody status than postsentence defendants. A presentence defendant is under the custody of the proprietors of the halfway house. He is released there by a judicial officer whose statutory goal is to impose the least restrictive conditions possible upon the defendant's liberty. In contrast, a postsentence defendant is in the custody of the Attorney General and under the authority of the BOP. Upon receiving custody, BOP initiates a procedure to determine the postsentence defendant's security level (*i.e.*, Minimum, Low, Medium, or High). In making this determination, the BOP considers a myriad of factors which include aspects of the conviction, judicial recommendations, public safety factors, potential to cause institutional disruption and escape potential. Bureau of Prisons, Security Designation & Custody Classification Manual, Program Statement 5100.3, Ch. 8 (1991). Based upon the security level, postsentence defendants are assigned to high security facilities (penitentiaries); medium security facilities with double fences, gun towers and armed perimeter patrols; low security facilities with a single fence, no gun towers and reduced security; or minimum security with no fences and minimal security

(*e.g.*, halfway houses). Therefore, even though a postsentence defendant and a presentence defendant may both spend time in a halfway house, the BOP is not obligated to treat them similarly because they were put in the halfway house under significantly different legal conditions.

III.

Because Moreland was not in "official detention" within the meaning of § 3585(b) while at RSCTC and because there was no equal protection violation in treating presentence defendants differently from postsentence defendants for purposes of giving jail-time credit for time spent in a halfway house, we affirm the district court's denial of Moreland's habeas petition.

LOKEN, Circuit Judge, concurring.

This case turns on the meaning of the term "official detention" in 18 U.S.C. § 3585(b), a statute enacted as part of the Comprehensive Crime Control Act of 1984.[1] The Majority concludes that the term is ambiguous and defers to an interpretation of prior law by the Attorney General acting through the Bureau of Prisons. If § 3585(b) had been enacted in a vacuum, I would agree with this analysis. But it was not. The Crime Control Act contained another provision (now 18 U.S.C. § 3142) that expanded the federal courts' authority to issue pretrial detention orders and, in the process, defined the word "detention" in the context of a federal prosecution. I conclude that the

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[1] Pub. L. No. 98-473, 98 Stat. 1843 (1984).

word "detention" in § 3585(b) incorporates the definition contained in § 3142. Since Moreland's time at RSCTC was not spent under a § 3142 detention order, I concur in the majority's decision to affirm.

To put this issue in context, we must begin with the Bail Reform Act of 1966.[2] the principal purpose of that statute was to liberalize existing bail procedures by providing for the mandatory pretrial release of all federal offenders in noncapital cases under the least restrictive conditions necessary to "reasonably assure the appearance of the person for trial," 18 U.S.C. § 3146(a) (1982). Another purpose was to "assure that persons convicted of crimes will receive credit for time spent in custody prior to trial."[3] To that end, Section 4 of the 1966 Act added the following sentence to 18 U.S.C. § 3568:

> The Attorney General shall give any such person credit toward service of his sentence for any days spent in *custody* in connection with the offense or acts for which sentence was imposed.

(Emphasis added.) The Bureau of Prisons 1979 Program Statement 5880.24(5)(b)(5) interpreted and applied this portion of § 3568. Administrative interpretation was needed because the word "custody" was left undefined in the statute.[4]

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[2] Pub. L. No. 89-465, 80 Stat. 214 (1966).

[3] H.R. Rep. No. 1541, 89th Cong., 2d Sess., *reprinted in* 1966 U.S.C.C.A.N. 2293, 2295.

[4] Indeed, the word was used inconsistently elsewhere in the 1966 Act. The conditions of release authorized in § 3146(a) included:

In the 1984 Crime Control Act, Congress once again amended the provisions relating to pretrial release and to presentence credit in the same statute. This time, however, the congressional emphasis was on *restricting* pretrial release of federal defendants who pose an unreasonable danger to public safety. To achieve this objective, Congress amended 18 U.S.C. § 3142 to provide (i) for release of most federal defendants under "the least restrictive further condition, or combination of conditions," as will reasonably assure appearance at trial and public safety during release, but (ii) for pretrial "detention" when "no condition or combination of conditions will reasonably assure" appearance at trial and public safety if the defendant is conditionally released. 18 U.S.C. §§ 3142(b), (c), (e). If detention is ordered, the pretrial detention order shall "direct that the person be committed to the *custody* of the Attorney General for confinement in a corrections facility," § 3142(i) (emphasis added).

It was in this context that Congress enacted § 3585(b) to replace the above-quoted sentence in § 3568. Section 3585(b) requires credit for presentence time spent in "official detention," rather than in "custody." The relevant

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> (1) place the person in the *custody* of a designated person or organization agreeing to supervise him;
>
> * * *
>
> (5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to *custody* after specified hours.

(Emphasis added.)

committee reports suggest that little if any change in substance was intended by this change in language:

> Subsection (b) provides that the defendant will receive credit toward the sentence of imprisonment for any time he has spent in *official custody* prior to the date the sentence was imposed. . . .

H. Rep. No. 98-1030 (excerpting S. Rep. No. 98-225), 98th Cong., 2d Sess., at 129, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3312 (emphasis added). Was this change, then, a meaningless juggling of synonyms, so that court decisions and Bureau of Prisons interpretations under § 3568 continue in full force and effect? I think not.

To ignore the definition of detention in § 3142 when construing § 3585(b) violates an established principle of statutory construction:

> In the absence of anything in the statute clearly indicating an intention to the contrary, where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout; and, where its meaning in one instance is clear, this meaning will be attached to it elsewhere.

Schooler v. United States, 231 F.2d 560, 563 (8th Cir. 1956), quoting 82 C.J.S., *Statutes* § 348. Section 3142 expanded the statutory authority for presentence orders of detention and carefully defined the circumstances under which such "detention" may be ordered. Given the prior interrelationship of these provisions in the earlier 1966 Act, this creates a compelling inference that the congressional intent in substituting "detention" for "custody" in § 3585(b) was to incorporate by reference the new definition of this term in § 3142. We should not need a detailed

roadmap in the legislative history to give effect to this obvious, logical legislative purpose.[5]

In these circumstances, the majority's deference to Program Statement 5880.24(5)(b)(5) in this case is misplaced. The Program Statement interpreted the undefined word "custody" in former § 3568. Because Congress included its own definition of detention in § 3142 of the Crime Control Act, the Program Statement is no longer needed to determine whether a presentence order issued pursuant to § 3142 resulted in "official detention."[6]

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[5] The majority's decision to adopt the Attorney General's prior interpretations of the word "custody" in construing the term "official detention" in § 3585(b) violates the normally strong presumption that a change in statutory language should not be ignored as meaningless. Moreover, the Supreme Court foreclosed our freedom to ignore this change in *United States v. Wilson*, ___ U.S. ___, 1992 WL 52830 (Mar. 24, 1991): in holding that the Attorney General has exclusive jurisdiction to make initial sentence credit determinations under § 3585(b), even though the explicit reference to his decisionmaking authority was deleted from § 3568, the Court stated that the substitution of "official detention" for "custody" was one of the meaningful changes made in § 3585(b).

[6] As the majority points out in its footnote 10, incorporating the § 3142 definition leaves some presentence detention issues unanswered, such as the defendant "who spent time in state custody on a charge that evolved into a federal offense." These situations, which the Program Statement termed "constructive federal custody," 5880.24(5)(c), are obviously not governed by reference to § 3142. In the 1966 Act, Congress clearly intended that credit be given for time spent in such custody. I agree with the majority that nothing in the 1984 Act suggests an intent to change that regime. Therefore, although the question is not before us, I agree that the Bureau of Prisons retains the discretion to determine, in the first instance, whether time spent in

Therefore, I would hold that a federal defendant is entitled to sentence credit under § 3585(b) for all time spent under a presentence detention order that was issued pursuant to 18 U.S.C. § 3142(i). Conversely, to the extent that the defendant has been released before trial under § 3142, no sentence credit may be allowed under § 3585(b) regardless of how restrictive the release conditions may have been.

This interpretation is sensible as well as consistent with principles of statutory construction. The result is a bright-line test that gives the government and the accused clear notice of the implications of the § 3142 pretrial release/detention issue – if the government successfully obtains pretrial detention, the defendant is guaranteed a sentence credit if convicted; on the other hand, if the defendant secures a pretrial release order, he or she receives no sentence credit if convicted.

This bright-line test has an additional advantage. It would eliminate the need for innumerable fact-based inquiries into the extent of pretrial "detention," inquiries that will inevitably expend Bureau of Prisons resources investigating events prior to the time the bureau has taken custody of the defendant. Certainty and efficiency would result from logically assuming that Congress intended to give the word "detention" the same meaning in these two interrelated provisions of the Crime Control Act. We should construe the statute accordingly.

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presentence custody not controlled by the federal trial court under § 3142 rises to the level of "official detention" for purposes of § 3585(b).

HEANEY, Senior Circuit Judge, dissenting, with whom LAY, Chief Judge, MCMILLIAN, RICHARD S. ARNOLD, and JOHN R. GIBSON, Circuit Judges, join.

Moreland is entitled to 150 days credit for the time he spent in custody at the Residential Services Community Treatment Center (Center). The denial of this sentence credit violates the language of the statute and the Constitution's equal protection clause. I respectfully dissent.

Deference to Bureau of Prisons Policy Statement

This case is about the meaning of two words: official detention. According to Congress, defendants are entitled to sentence credit for the time they spent in "official detention" before their court-imposed sentence begins. Unlike this court, I do not believe that the term "official detention" is "ambiguous" or "abstruse[]," and I would not defer to the interpretation of the statute adopted by the Bureau of Prisons.

If the text of a statute is ambiguous and thus open to interpretation in some respects, "a degree of deference is granted to the agency, though a reviewing court need not accept an interpretation which is unreasonable." *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 60 U.S.L.W. 4268, 4270 (U.S. 1992). Thus, the deference is not absolute and the reviewing court is the final authority on issues of statutory construction. If a court "ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron U.S.A. v. Natural Resource Defense Council*, 467 U.S. 837, 843 n.9 (1984).

The statute at issue here does not define the term "official detention." Every undefined term, however, is not necessarily ambiguous. For example, even though official detention is not defined, one could not persuasively contend that the term "official detention" excludes time spent incarcerated in a county jail. We routinely construe the meaning of statutes when important terms are not defined, and the "ordinary and obvious meaning of the phrase is not to be lightly discounted." *INS v. Cardoza-Fonseca,* 480 U.S. 421, 431 (1987). Although the statute does not expressly indicate whether "official detention" encompasses custody in a halfway house, nothing in the statute or legislative history indicates that "official detention" should be construed narrowly or contrary to its "ordinary, contemporary, common meaning." *Perrin v. United States,* 444 U.S. 37, 42 (1979).

Legislative History and Plain Meaning of Official Detention

The legislative history of the statute is significant because it demonstrates that Congress has continually *expanded* the class of prisoners authorized to receive sentence credit for pretrial custody. At first, 18 U.S.C. 3568, the predecessor statute to the statute at issue here, did not allow credit for pretrial custody. Act of June 29, 1932, ch. 310, § 1, 47 Stat. 381 (1932). In 1960, Congress amended § 3568 and provided that a person convicted of an offense subject to a mandatory minimum sentence be granted sentence credit for time spent in jail for want of bail. Act of Sept. 2, 1960, Pub. L. No. 86-691, § 1(a), 74 Stat. 738 (1960). In 1966, Congress further broadened the scope of section 3568 by providing that all sentenced

prisoners receive sentence credit for "any days spent in custody in connection with the offense or acts for which sentence was imposed."

As the Supreme Court recently noted, Congress again enlarged the class of defendants eligible to receive credit in 1984 when it replaced section 3568 with the current statute. *See United States v. Wilson*, 60 U.S.L.W. 4244, 4247 (U.S. 1992). At that time, Congress also replaced the term "custody" with "official detention." *See id.* Although the legislative history states that Congress did not intend a different result by this change in language, the new language is at least more precise than the old. *See Ramsey v. Brennan*, 878 F.2d 995, 996 (7th Cir. 1989) (construing former § 3568) ("[t]he word [custody] is a chameleon.").

With this legislative guidance, I turn to the ordinary meaning of the words at issue. Official is something "prescribed or recognized as authorized." *Webster's Ninth New Collegiate Dictionary* at 820 (1986). Here a court order required Moreland to stay at the Residential Services Community Treatment Center and to obey the Center's rules. The Center acted as an agent of the criminal justice system, and the term "official" certainly applies to Robert Moreland's 150 day stay. The ordinary definition of detention is a "period of temporary custody prior to disposition by a court," *see id.* at 345, so Moreland's custody at the Center must also be considered "detention."

Degree of Restraint on Moreland

The touchstone here is whether the degree of confinement or restraint provided by residents in a halfway

house is sufficient to constitute custody within the meaning or intent of the statute.[1] The Bureau of Prisons, to whom the majority defers, recognizes this focus. *See* BOP Program Statement 5880.24(5)(b)(5) (time spent in halfway house as a condition of bail or bond "is not creditable as jail time since the degree of restraint provided by residence . . . is not sufficient restraint to constitute custody within the meaning or intent of 18 USC 3568"). The only question before us is whether Moreland was subject to the degree of restraint necessary to allow him sentence credit. All agree that an incarcerated individual is entitled to sentence credit, so it follows that a defendant subject to conditions as restrictive as incarceration may receive sentence credit. Under this standard, Moreland is entitled to sentence credit. Although the court characterizes Moreland's confinement as a mere curfew, it can do so only by ignoring the record. For example, the court suggests that Moreland was subject only to a midnight to 8:00 a.m. curfew during his confinement at the Center and that Moreland was subject to fewer restrictions than those imposed on the defendant in *Brown v. Rison*, 895 F.2d 533 (9th Cir. 1990) (prisoner in custody of halfway house for 10 hours every day subject to official

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[1] We previously have suggested that custody or detention may not require incarceration in a jail. In *Carruthers v. United States*, 525 F.2d 843, 844 (8th Cir. 1975), we dismissed a claim for sentence credit for time spent on parole because the petitioner's claim was too "sparse and conclusory" to demonstrate that the degree of restraint imposed on him at the halfway house entitled him to sentence credit. The dismissal was without prejudice, and permitted the petitioner to refile if he could show that his time in the halfway house "was, in effect, a form of custody or confinement." *Id.*

custody). *See ante* at 7 n.6. Both of these assertions are incorrect.

The record reveals that Moreland was *completely confined* twenty-four hours a day in the Center during his first two weeks of custody there. Not only was Moreland barred from leaving the grounds during that time, but he was subject to the liberty restrictions, rules, and regulations of the Center. These rules included: no drugs, narcotics, or alcohol; no weapons, sharp instruments, or knives; random urine and breath tests; nightly bed checks; no smoking in room; limited visiting hours, with all visiting to take place in the Center's dining room; and telephone use limited to ten minutes. These restrictions mirror those imposed on jail inmates.[2] The Bureau of Prisons' policy statement, however, makes no allowance for a situation such as Moreland's. I cannot see how the total confinement Moreland was subjected to for two weeks can be considered less restrictive than incarceration and undeserving of sentence credit, and the court does not offer a reason for its conclusion to the contrary.

After two weeks of total confinement, the Center gradually increased the amount of time that Moreland could be away from the Center. During this time, Moreland's conditions of confinement were more restrictive or equally restrictive as the 10 hours of daily confinement

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[2] Significantly, Moreland was not confined to the relative comfort of his home during his time at the Center. *Compare United States v. Wickman*, 955 F.2d 592 (8th Cir. 1992) (en banc) (per curiam) (Lay & McMillian, JJ., dissenting) (defendant not entitled to sentence credit for days spent under pre-trial house arrest).

held to be custody in *Brown v. Rison*. *Brown*, 895 F.2d at 536. For two weeks, Moreland was allowed to seek employment at the Center's direction between 8:00 a.m. and 4:00 p.m. (sixteen hours of confinement a day). Moreland then was granted a 7:00 p.m. curfew for the two weeks after he found a job (thirteen hours of confinement a day). The Center then imposed a 10:00 p.m. curfew upon Moreland (ten hours of confinement a day). It as not until Moreland had been at the Center for approximately two months that he was subject to a midnight to 8:00 curfew.[3] At all times, the Center subjected Moreland to a compulsory sign-in and sign-out surveillance system. The Center required Moreland to provide an accurate address and telephone number of his destination when signing out, monitored his whereabouts at all times while outside the center, and subjected him to telephone checks during that time.

In short, the Center subjected Moreland to 24-hour supervision and physically incarcerated him for a substantial part of each day for 150 days. Indeed, for part of his confinement at the Center, Moreland was subject to significantly stricter liberty restrictions than those in *Brown v. Rison*. Moreover, as I noted earlier, the Center

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[3] The court's opinion suggests that Moreland had limited phone privileges during his midnight to 8:00 a.m. curfew. The record indicates otherwise. According to the Center's rules, Moreland was subject to "periodic bed checks . . . throughout the night," so the Center must have required residents to be in their rooms during the nightly curfew. It does not appear that residents had personal phones in their rooms, as the Rules refer only to use of "*the residence telephone*" (emphasis added).

acted at the behest of the criminal justice system. Moreland was subject to "official detention," and to deny him sentence credit is unreasonable and contrary to the considerations of fairness that inspired Congress' decision to provide credit for time served. *Brown*, 895 F.2d. at 536.

Moreland's Conditional Release

The court places great weight on the fact that the Magistrate-Judge granted Moreland a conditional release within the meaning of 18 U.S.C. 3142[4] when he released Moreland on bond and ordered him to be held in custody at the Center and to obey its rules. This emphasis is misplaced and focuses attention away from the true issue in this case. The question is not whether Moreland was "detained" within the meaning of the Bail Reform Act, but whether the time he served in custody at the Center was "official detention" under 18 U.S.C. § 3585(b)(1). The degree of restraint provided by residence in a community center is the operative question here; terms used in the Bail Reform Act do not apply to the statute at issue here, and the court's discussion of the Bail Reform Act is a nonsequitur.[5]

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[4] The Bail Reform Act of 1984 and its amendments.

[5] If the language of the Bail Reform Act were relevant to Congress' intent concerning sentence credit, then that Act's repeated references to "custody" in the context of conditional release would support the conclusion that defendants confined to restrictive "custody" are eligible for sentence credit. The Bail Reform Act permits a judicial officer to "release" a defendant under conditions that require the defendant to be placed in the custody of a designated person, be physically constrained in that person's custody for specified hours, and satisfy other

Equal Protection

It is undisputed that Moreland was subject to the same conditions of confinement as prisoners who were completing their sentence at the Center. All inmates at the Center are under the same rules and conditions whether they are presentence or postsentence detainees. Moreland, however, will not receive sentence credit, but postsentence detainees who lived under identical conditions will. In my view, this disparate treatment of similarly situated groups without a rational basis for the disparity violates the Constitution. *See Johnson v. Smith,* 696 F.2d 1334 (11th Cir. 1983).

The court justifies this result by focusing on the "legal custody status" of presentence and postsentence inmates. According to the court, presentence detainees released to a halfway house are placed in the least restrictive conditions possible, while postsentence detainees are in the custody of the Attorney General, with the Bureau of Prisons assigning inmates to various institutions based on security and other factors. This focus is misleading.

First, the legal status of presentence and postsentence detainees is not as different as the court suggests. If

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conditions deemed necessary by a judicial officer. *See* 18 U.S.C. §§ 3142(c)(B)(i) – 3142(c)(B)(xiv) (1988). If the statutory terms "official detention" and "in custody" are interchangeable for sentence credit purposes, as the court claims, *see ante* at 5 n.6, and if terms used in the Bail Reform Act apply to sentence credit issues, then defendants granted conditional release but placed in "custody" under the Bail Reform Act should be granted sentence credit under section 3585. Moreover, the present statute is entitled "Credit for prior *custody,*" *see* 18 U.S.C. § 3585(b) (emphasis added).

Moreland had escaped from the Center he would have been subject to criminal penalties similar to those applicable if he had been a postsentence detainee. *Compare* U.S.S.G. 2J1.6 (failure to appear by defendant) *with* U.S.S.G. § 2P1.1 (escape). In fact, some courts have gone one step further, holding that the escape statute applies to a pretrial detainee such as Moreland. *See United States v. Rindigo,* 411 A.2d 373 (D.C. 1980) (defendant in pretrial detention at halfway house subject to escape charges under 18 U.S.C. 751); *United States v. Vaughn,* 446 F.2d 1317 (D.C. Cir. 1971) (pretrial detainee who participated in work-release program under authority of Bail Reform Act and escaped held subject to escape charges under 18 U.S.C. 751).[6]

Moreover, I do not see how a delineation of the paths by which people become residents or a recitation of official goals and reasons leading to their residential status can adequately serve as a rational basis for differing treatment. Nobody would contend that the Bureau of Prisons could justify a denial of sentence credit to presentence detainees in county jails because their legal status differed from postsentence defendants. Under the statute, the degree of confinement is what is at issue, and the restraints on Moreland's liberty at the Center were the

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[6] Other courts, perhaps more wisely, have declined to hold that pretrial detainees are subject to prosecution for escape under section 751. *See Randall v. Whelan,* 938 F.2d 522, 525 (4th Cir. 1991) (pretrial detainees released on bond not immediately subject to prosecution for escape under section 751); *United States v. Miranda,* 749 F.Supp. 1062 (D. Colo. 1990) (pretrial defendant released on conditions of bond not subject to prosecution for escape under section 751).

same as those who were concluding a sentence there. Moreover, as the court acknowledges, the restrictions on Moreland's liberty were among the most severe that could have been imposed as a condition of pretrial release. The government placed Moreland into a halfway house not only to ensure his appearance at trial but also to protect the community, a goal that is perhaps the central purpose of incarceration today.

For the foregoing reasons I dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

For The Eighth Circuit

No. 90-5375

Robert Scott Moreland, a/k/a Robert S. Moreland, a/k/a "Bobby", Appellant, v. United States of America, Appellee.	* * * * * * * * * *	Appeal from the United State District Court for the District of Minnesota.

Submitted: December 4, 1990

Filed: April 24, 1991

Before ARNOLD, Circuit Judge, HEANEY, Senior Circuit Judge, and MAGILL, Circuit Judge.

HEANEY, Senior Circuit Judge.

Robert Scott Moreland appeals the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2255. Moreland argues that he should receive credit on his sentence for time spent in a halfway house while awaiting trial and sentence. Because Moreland was in official detention while at the halfway house, we

reverse and remand with direction to credit Moreland for time spent at the halfway house.

I.

Moreland was indicted on July 26, 1989 and charged with two counts of bank fraud in violation of 18 U.S.C. § 1344 and two counts of using false social security cards in violation of 18 U.S.C. § 408(g)(2). He was arrested on July 28, 1989 and held in jail until September 5, 1989, when he was released on bond and ordered to reside at the Reentry Services Community Treatment Center (RSCTC) pending resolution of the criminal action brought against him. While at RSCTC, Moreland was required to obey all rules of the center,[1] and was required to seek employment at the Center's direction. Moreland was not allowed to leave the RSCTC grounds for the first two weeks he was at the Center. During the next two months, the Center gradually increased the amount of time Moreland could be away from the Center. Throughout his stay at RSCTC, however, Moreland was required to abide by at least a midnight to 8:00 a.m. curfew.[2]

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[1] The rules included: no drugs, narcotics, or alcohol; no weapons, sharp instruments, or knives; random urine and breath tests; nightly bed checks; no smoking in room; limited visiting hours, with all visiting to take place in the center's dining room; telephone use limited to ten minutes; and compulsory sign in and sign out. Moreland was required to provide an accurate address and telephone number of his destination when signing out, was expected to account for his whereabouts at all times while outside the center, and was subject to telephone checks during that time.

[2] The dissenting opinion suggests that Moreland had limited phone privileges curing his midnight to 8:00 a.m. curfew,

On October 30, 1989, Moreland pleaded guilty to one count of fraud. On February 2, 1990, the court sentenced him to eighteen months imprisonment. From September 5, 1989 until March 12, 1990, when Moreland began serving his sentence at a federal prison, Moreland resided at RSCTC. At the federal prison, Moreland filed a petition requesting that the 150 days he spent at RSCTC prior to sentencing be credited against his eighteen-month sentence. After the Bureau of Prisons (BOP) denied this request, Moreland petitioned the district court for habeas relief. The district court refused to grant this relief because it determined that Moreland was not in "official detention" while at RSCTC.

On appeal, Moreland argues that his presentencing detention at RSCTC was "official detention" within the meaning of 18 U.S.C. § 3585(b) (1988)[3] and that the denial of sentence credit for the presentencing detention violated the equal protection clause because other prisoners

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but the record indicates otherwise. According to the Center's rules, Moreland was subject to "periodic bed checks . . . throughout the night," so the Center must have required residents at RSCTC to be in their rooms during the nightly curfew. It does not appear, however, that RSCTC residents had personal phones in their rooms, as the Rules refer only to use of "*the* residence telephone" (emphasis added).

[3] 18 U.S.C. § 3585(b) provides:

(b) Credit for prior custody. – A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences –

(1) as a result of the offense for which the sentence was imposed; . . .

that has not been credited against another sentence.

residing at RSCTC received sentence credit for such residence. The government argues that the court properly denied credit because halfway houses do not fall under the statutory definition of official detention. It further argues that Moreland and the prisoners at RSCTC who received sentence credit were not similarly situated, because Moreland had not yet been sentenced and the other prisoners had. The government thus claims that because Moreland and the other halfway house residents were not similarly situated, failure to treat them similarly did not violate the equal protection clause.

Congress has stated that "[a] defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences." 18 U.S.C. § 3585(b). Congress did not, however, provide a clear definition of "official detention." Moreland argues that the plain meaning of "detention" describes the time he spent at RSCTC and that he therefore should receive § 3585(b) credit. We agree. (Certainly there was "detention," and it can hardly be called unofficial.)

There is a conflict among the circuits on the question. The Fourth, Seventh, and Tenth Circuits are of the view that "official detention" means full physical incarceration. *See United States v. Insley*, 927 F.2d 185, 186 (4th Cir. 1991) (appeal bond that partially restricted defendant to parents' house not official detention); *Ramsey v. Brennan*, 878 F.2d 995, 996 (7th Cir. 1989); *United States v. Woods*, 888 F.2d 653, 655 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 1301 (1990). In reaching its decision, the Seventh Circuit relied on the following BOP policy statement:

> Time spent in residence in a residential community center . . . as a condition of bail or bond . . . is not creditable as jail time since the degree of restraint provided by residence in a community center is not sufficient restraint to constitute custody within the meaning or intent of 18 U.S.C. § 3568.[4]

Brennan, 878 F.2d at 996 (quoting BOP Policy Statement No. 5880.24(5)).

The Ninth Circuit, however, has taken the position that the restrictions of a halfway house were "simply too close to incarceration to permit a distinction for purposes of credit against his sentence" when residents were subject to its regulations, to drug testing, to curfews, and to work agreements. *Brown v. Rison*, 895 F.2d 533, 536 (9th Cir. 1990). While acknowledging their responsibility to defer to the BOP's interpretation of "official detention," the Ninth Circuit concluded that such deference was unnecessary when the BOP's interpretation was unreasonable and "contrary to the considerations of fairness that must have underlain Congress' provision of credit for time served." *Id. See also Demarest v. Manspeaker*, 111 S.Ct. 599, 603 (1991) (no deference accorded to administrative interpretation of a statute that was contrary to the statute's plain language).

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[4] 18 U.S.C. § 3568 is the predecessor to 18 U.S.C. § 3585. Section 3568 uses the phrase "in custody" instead of "in official detention." The Tenth Circuit held that this difference does not affect the analysis for the purpose of determining whether time in a halfway house should be credited to a sentence, and we agree. *See Woods*, 888 F.2d at 654-55.

The restrictions placed on Moreland are similar to those in *Brown*. As with *Brown*, Moreland was subject to 24-hour supervision by the center, which was acting as an agent of the criminal justice system, and was physically incarcerated there for a substantial part of each day for 150 days. *Brown*, 895 F.2d at 536. Indeed, for part of his confinement at RSCTC, Moreland was subject to a stricter curfew than that in *Brown*. The restrictions placed on Moreland are similar to those placed on jail prisoners who have work-release privileges, and it cannot be contended that such prisoners are not in "official detention." We agree with the Ninth Circuit that the BOP's interpretation is unreasonable or contrary to considerations of fairness. *See also United States v. Fernandez*, No. 89-234-33 (E.D. Pa. July 16, 1990) (following *Brown v. Rison*). *But cf. Insley*, 927 F.2d at 187 (distinguishing *Brown* because *Brown* involved more restrictive conditions.

As the dissenting opinion points out, Moreland was granted a conditional release within the meaning of 18 U.S.C. § 3142[5] when the Magistrate-Judge released him on bond and ordered him to be held in custody at RSCTC and to obey its rules. The question, however, is not whether Moreland was "detained" within the meaning of the Bail Reform Act, but whether the time he served in custody at the RSCTC was "official detention" under 18 U.S.C. § 3585(b)(1). As even the BOP policy statement recognizes, "the degree of restraint provided by residence in a community center" is the operative question here. We do not see why terms used in the Bail Reform Act apply

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[5] The Bail Reform Act of 1984 and its amendments.

to the statute at issue here, and the dissenting opinion does not provide a reason.

Even if the language of the Bail Reform Act were any guide to what Congress meant in its statutes concerning sentence credit, the Bail Reform Act's repeated references to "custody" in the context of conditional release support the conclusion that some defendants who have been held in restrictive "custody" are entitled to sentence credit. As the dissent notes, the Bail Reform Act permits a judicial officer to "release" a defendant under conditions that require the defendant to be placed in the custody of a designated person, return to custody for specified hours, and satisfy other conditions the judicial officer deems necessary. *See* 18 U.S.C. §§ 3142(c)(B)(i) - 3142(c)(B)(xiv) (1988). The predecessor statute to 18 U.S.C. § 3585 stated that those "in custody" were entitled to sentence credit, so under the dissent's reasoning, defendants granted conditional release but placed in "custody" under 18 U.S.C. § 3142 could also be granted sentence credit.[6]

A defendant subject to conditions of release, of course, is not automatically entitled to sentence credit. A defendant must demonstrate, as Moreland has, that he was subject to conditions closely approaching or equaling incarceration. Only those defendants released under highly restrictive conditions will be entitled to sentence

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[6] Given the legislative history of 18 U.S.C. § 3585, the dissent does not and could not claim that Congress intended a different result by changing the phrasing from "in custody" to "in official detention." *See Woods*, 888 F.2d at 655; *supra* note 4. Moreover, the present statute is still entitled "Credit for prior *custody*," *see* 18 U.S.C. § 3585(b) (emphasis added).

credit. It is not enough to be subject to some conditions, such as electronic monitoring, a requirement to live with one's parents, and a curfew. *See Insley*, 927 F.2d at 186. The defendant must also be in an institution and be subject to that institution's jail-like rules, as here and in *Brown*, 895 F.2d at 534, 536.

Having decided that Moreland was in detention for the purposes of section 3585(b), we need not decide whether the policy of not granting credit to presentence residents while granting credit to prisoners finishing their sentences is disparate treatment of similarly situated groups without a rational basis for the disparity. *See Woods*, 888 F.2d at 656; *Johnson v. Smith*, 696 F. 2d 1334, 1336-37 (11th Cir. 1983). We simply note that there is no dispute that residents of the Center are under the same rules and conditions whether they are presentence or post-sentence inmates.

Reversed and remanded for action consistent with this opinion.

MAGILL, Circuit Judge, dissenting.

While I agree with the majority that Congress did not adequately define "official detention," I disagree with the majority's decision to reject the Bureau of Prisons' interpretation and adopt the broader definition used by the Ninth Circuit in *Brown v. Rison*, 895 F.2d 533, 536 (9th Cir. 1990).

Because the *Brown* court usurped the BOP's interpretative role without sufficient justification, I do not believe that *Brown* was correctly decided. In *Chevron U.S.A. v. Natural Resources Def. Council*, 467 U.S. 837

(1984), the Supreme Court held that if a statute is "silent or ambiguous with respect to the specific issue," and if "the agency's answer is based on a permissible construction of the statute," we must defer to the agency's interpretation. *Id.* at 843; *accord Hammontree v. N.L.R.B.*, 925 F.2d 1486, 1491 (D.C. Cir. 1991). The issue in *Brown*, like the issue in this case, hinges on the interpretation of the phrase "official detention" in the statute. The absence of any clarifying language in the congressional history of the statute and the disagreement in the circuits over the interpretation of this phrase supports the conclusion that § 3585's reference to "official detention" is ambiguous. The Bureau of Prisons resolved this ambiguity in its Program Statement on Sentence Computation, Jail Time Credit Under 18 U.S.C. § 3568, BOP Program Statement 5880.24(5)(b)(5). The Ninth Circuit refused to accept the BOP interpretation because it believed that this interpretation "excludes [from sentencing credit] enforced residence under conditions approaching those of incarceration." *Brown*, 895 F.2d at 536. This is simply not true. The same section of the Program Statement cited by the majority in this case also states that "time spent in jail-type facility (not including a community based program located in a Metropolitan Correctional Center or jail) as a condition of bail or bond is creditable as jail time because of the greater degree of restraint." BOP Program Statement 5880.24(5)(b)(5) (emphasis in original). The BOP makes a clear distinction between residential community centers and jail-type facilities based on their respective degrees of restraint and explicitly grants sentencing credit when a presentencing defendant is placed

under a great degree of restraint. This is both a reasonable and permissible construction of § 3585. Therefore, since *Chevron* requires courts to defer to permissible constructions of ambiguous statutes, the Ninth Circuit should have deferred to the BOP's interpretation of "official detention" and not granted the presentencing defendant sentence credit for time spent in halfway house.

Even if *Brown* were correct, however, it would not apply in this case because the liberty restrictions in *Brown* were greater than those placed upon Moreland in RSCTC. In *Brown*, the court acknowledged its responsibility to defer to the BOP's interpretation but declined to do so because, in its view, the BOP's policy was unreasonable and "contrary to the considerations of fairness." *Id.* at 536. The *Brown* court held that the restrictions of the halfway house were "simply too close to incarceration to permit a distinction for purposes of credit against his sentence." *Id.* at 536. The conditions in *Brown* were clearly more restrictive than those placed on Moreland at RSCTC. In *Brown*, the curfew lasted from 7:00 p.m. to 5:00 a.m. and during that time the prisoners were allowed no outside contact. In contrast, Moreland's curfew lasted from midnight to 8:00 a.m. with limited phone privileges. While Moreland was subject to some of the restrictions present in *Brown* – no drugs, no alcohol, drug testing, and limited travel – Moreland still had much more liberty in RSCTC than he would have had in jail. The Ninth Circuit's analysis falls far short of being compelling and is not as persuasive as the Fourth, Seventh and Tenth Circuits' approach.

In *Ramsey v. Brennan*, 878 F.2d 995 (7th Cir. 1989), the Seventh Circuit refused to grant sentence credit for time

spent in a halfway house. The court opined that whether the deprivation of liberty associated with confinement in a halfway house, a "twilight zone between prison and freedom," qualifies as official detention was not "a question susceptible of rational determination, at least by tools of inquiry available to judges." *Id.* at 996. Instead of making such a determination, the court deferred to the BOP policy statement that prohibits using time spent in a residential community center as credit toward jail time. *Brennan*, 878 F.2d at 996 (quoting BOP Policy Statement No. 5880.24(5)(b)(5)).

In *United States v. Woods*, 888 F.2d 653 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 1301 (1990), the Tenth Circuit reached the same result without relying on the BOP policy statement. The *Woods* court held that "official detention" means "imprisonment in a place of confinement, not stipulations or conditions imposed upon a person not subject to full physical incarceration." *Id.* at 655; *see also United States v. Insley*, No. 90-7324 (4th Cir. Mar. 7, 1991) (adopting *Woods* standard, which required actual physical incarceration for official detention sentence credit). Consequently, the court held that presentencing detention in a halfway house could not be used for sentence credit. *Id.*

Furthermore, a plain reading of the relevant statutes indicate that Moreland was not in detention when he resided at RSCTC, but rather was granted a conditional release. Presentencing defendants who are permitted to reside in a halfway house are not in detention under the Release and Detention Pending Judicial Proceedings chapter of the U.S. Code. 18 U.S.C. § 3141-56 (1988). At a criminal defendant's first appearance before a judicial officer after arrest, the judicial officer must issue an order

on the defendant's pretrial status. The defendant is either released (with or without conditions) or detained. 18 U.S.C. § 3142(a). If the defendant is detained, the detention order must include language that directs that the defendant be "committed to the custody of the Attorney General for confinement in a corrections facility. . . . " 18 U.S.C. § 3142(i)(2). However, if the defendant is released, at worst he must "remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court. . . . " 18 U.S.C. § 3142(c)(1)(B)(i). Furthermore, when determining the conditions of release, the judicial officer must maintain the presumption of innocence of the presentencing defendant,[1] 18 U.S.C. § 3142(j), and impose the "least restricting" conditions that "will reasonably assure the appearance of the person as required and the safety of any other person and the community. . . . " 18 U.S.C. § 3142(c)(1)(B). Placing a presentencing defendant in the custody of a halfway house is one common form of conditional release. If a presentencing defendant is committed to the custody of a halfway house, he is not in the custody of the Attorney General, and therefore is not in

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[1] Once a defendant has been found guilty of a crime, the presumption of innocence is replaced by a presumption of detention. This presumption of detention can be overcome if a judicial officer finds by clear and convincing evidence that the defendant "is not likely to flee or pose a danger to the safety of any other person or the community if released." 18 U.S.C. § 3143(a) (1988). If a presentencing defendant has been found guilty and remains in a halfway house without a transfer of custody to the Attorney General, then it is clear that the presumption of detention has been overcome and the presentencing defendant is still on conditional release.

detention. Therefore, if an [sic] presentencing defendant is not in detention, he cannot be considered in "official detention" for purposes of sentencing credit.

Moreland also argues that the BOP's denial of sentence credit for his presentencing detention in RSCTC violated the equal protection clause because other prisoners were able to credit their time at RSCTC against their sentences. Since presentencing defendants are not a suspect class, Moreland's equal protection argument is reviewed under a rational basis standard. *See Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-41 (1985). Therefore, Moreland prevails if (1) persons who are similarly situated are treated differently by the government, and (2) the government fails to provide a rational basis for the dissimilar treatment. *Id.*

The government addressed this argument in the district court, pointing out that presentencing defendants and postsentencing defendants[2] are not similarly situated. I agree. Postsentencing defendants are legally distinct from presentencing defendants and therefore, sentence credit provided for postsentencing defendants in a halfway house need not be provided for presentencing defendants living under the same conditions. First, presentencing defendants are presumed innocent and are placed in the halfway house under that presumption. Postsentencing defendants have been adjudicated guilty and do not enjoy the benefits of this presumption. There can hardly be a greater difference in legal status within

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[2] At this point, the criminal defendant is more properly referred to as "prisoner" or "inmate," but to simplify the discussion, I will use the phrase "postsentencing defendant."

the American criminal justice system. Furthermore, the presentencing defendant is sent to a halfway house by a judicial officer whose statutory goal is to impose the least restrictive conditions upon the defendant's liberty. A postsentencing defendant is sent to a halfway house because such a facility is appropriate in light of her crime, the circumstances surrounding the crime, and her background.

The second radical legal difference between a presentencing defendant and a postsentencing defendant is their custody status. A presentencing defendant in a halfway house is under the custody of the proprietors of the halfway house. A postsentencing defendant is in the custody of the Attorney General and under the authority of the Bureau of Prisons (BOP). The postsentencing classification procedure presents a sharp contrast. Upon receiving custody, BOP initiates a procedure to determine the postsentencing defendant's security level (*i.e.*, Minimum, Low, Medium, or High). In making this determination, the BOP considers a myriad of factors which include aspects of the conviction, judicial recommendations, public safety factors, potential to cause institutional disruption, escape potential, etc. Bureau of Prisons, Security Designation & Custody Classification Manual, Policy Statement 5100.3, Ch. 8 (1991). Based upon the security level, postsentencing defendants are assigned to high security facilities (penitentiaries); medium security facilities with double fences, gun towers, armed perimeter patrols; low security facilities with a single fence, no gun towers and reduced security; or minimum security with no fences and minimal security (*e.g.*, halfway houses).

Therefore, even though a postsentencing defendant and a presentencing defendant may both spend time in a halfway house, the BOP is not obligated to treat them similarly because they were put in the halfway house under significantly different legal conditions. It is also important to note that for a postsentencing defendant, a halfway house is one of the least restrictive options while a halfway house for a presentencing defendant is one of the most restrictive alternatives.

For these reasons, I believe the district court properly denied Moreland's equal protection claim. *See Woods*, 888 F.2d at 656 (as a matter of law, presentencing defendants and postsentencing defendants are not similarly situated because of divergent legal status).

Moreland also argues that the district court should have adopted the Eleventh Circuit's approach in *Johnson v. Smith*, 696 F.2d 1334 (11th Cir. 1986). In *Johnson*, the court stated that treating presentencing defendants and postsentencing defendants differently would not violate the Constitution if (1) conditions for presentencing defendants were less restrictive than for postsentencing defendants, or (2) the government had a rational reason for the disparate treatment of the two similarly situated groups. *Id.* at 1337. However, the *Johnson* court explicitly refused to consider the antecedent question of whether presentencing defendants and postsentencing defendants are similarly situated because the government had conceded that they were similarly situated in the district court. *Id.* at 1338. Furthermore, the court qualified its decision by stating: "We do not base our decision on any determination as to whether or not post-sentence and pre-sentence detainees are always similarly situated . . . or whether or

not a rational reason for disparate treatment of the two groups could ever be shown." *Id.* The holding in *Johnson* does not apply here because presentencing defendants and postsentencing defendants are not similarly situated and Moreland does not have the benefit of a concession from the government on this issue.

Since Moreland was not officially detained while at RSCTC and since there was no equal protection violation in treating presentencing defendants differently from postsentencing defendants, I would affirm the district court's denial of Moreland's habeas petition.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

18 U.S.C. § 3585

§ 3585. Calculation of a term of imprisonment

(a) Commencement of sentence. – A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.

(b) Credit for prior custody. – A defendant shall be given credit toward the service of a term of imprisonment for any time as he has spent in official detention prior to the date the sentence commences –

> (1) as a result of the offense for which the sentence was imposed; or
>
> (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

that has not been credited against another sentence.

(Added Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2001.)

Editorial Notes

Effective Date. Section effective on the first day of first calendar month beginning thirty six months after Oct. 12, 1984, applicable only to offenses committed after taking effect of sections 211 to 289 of Pub.L. 98-473, and except as otherwise provided for therein, see section 285 of Pub.L. 98-479, as amended, set out as a note under section 3551 of this title.

18 U.S.C. § 3568
(repealed and replaced by 18 U.S.C. § 3585)

§ 3568. Effective date of sentence; credit for time in custody prior to the imposition of sentence

The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed. As used in this section, the term "offense" means any criminal offense, other than an offense triable by court-martial, military commission, provost court, or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by Act of Congress.

If any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.

No sentence shall prescribe any other method of computing the term.

(June 25, 1948, c. 645, 62 Stat. 838; Sept. 2, 1960, Pub.L. 86-691, § 1(a), 74 Stat. 738; June 22, 1966, Pub.L. 89-465, § 4, 80 Stat. 217.)

Supreme Court, U.S.
FILED
NOV 13 1992
CLERK

(2)

No. 92-458

In the Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT SCOTT MORELAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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12 pp

QUESTION PRESENTED

Whether, under 18 U.S.C. 3585, a federal inmate is entitled to credit against his sentence for time spent in a community treatment center as a condition of pretrial release on bond.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. 1a-29a) is reported at 968 F.2d 655. The opinion of the court of appeals panel (Pet. App. 30a-45a) is reported at 932 F.2d 690.

JURISDICTION

The judgment of the court of appeals was filed on June 30, 1992. The petition for a writ of certiorari was filed on September 14, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 26, 1989, a grand jury in the District of Minnesota indicted petitioner on two counts of bank fraud, in violation of 18 U.S.C. 1344, and two counts of using false social security cards, in violation of 18 U.S.C. 408(g)(2). He was taken into custody on July 28, 1989, and held until September 5, 1989, when he was released on bond. As a condition of his release, petitioner was ordered to reside at the Reentry Services Community Treatment Center (RSCTC). Petitioner resided at RSCTC from September 5, 1989, until March 12, 1990. Pet. App. 2a-3a, 31a.

2. On October 30, 1989, petitioner pleaded guilty to one count of fraud. On February 2, 1990, the district court sentenced him to 18 months' imprisonment. After he began serving his sentence, petitioner filed a request with the Bureau of Prisons seeking credit for the 150 days he spent at RSCTC. The Bureau denied the request on the ground that during that period petitioner had not been in "official detention" within the meaning of 18 U.S.C. 3585(b), the statute governing sentence credit for periods a defendant has spent in detention prior to sentencing. Pet. App. 3a, 32a; Pet. 2, 4-5.

Petitioner then filed a petition under 28 U.S.C. 2255, alleging that he was denied the equal protection of the law by the Bureau's policy of denying sentence credit to defendants released prior to trial on condition that they reside at community treatment centers, while granting credit to defendants completing their sentences at such centers. The district court denied the motion. It found that no equal protection violation had occurred because defendants released pretrial to community treatment

centers are not situated similarly to defendants completing their sentences. Pet. App. 3a-4a.

3. A divided panel of the court of appeals reversed, holding that the time petitioner spent at the community treatment center constituted "official detention" within the meaning of Section 3585. The panel noted that the Bureau of Prisons (BOP) had defined "official detention" to exclude periods of pretrial release when the defendant, as a condition of that release, is required to reside at a community treatment center. The panel held, however, that BOP's interpretation was "unreasonable or contrary to considerations of fairness." Pet. App. 34a-35a. The court reasoned that "[t]he restrictions placed on [petitioner] are similar to those placed on jail prisoners who have work-release privileges, and it cannot be contended that such prisoners are not in 'official detention.'" *Id.* at 35a.[1]

In dissent, Judge Magill argued that the majority erred in failing to defer to the Bureau's interpretation of the statute. Judge Magill also argued that the plain meaning of the term "detention" did not extend to the kinds of restrictions imposed on petitioner. Judge Magill concluded that the term "detention" in Section 3585 should be construed in light of the Bail Reform Act of 1984, 18 U.S.C. 1341 *et seq.*, which makes a clear distinction between release, with or without conditions, and detention. Pet. App. 37a-45a.

4. Sitting en banc, the court of appeals vacated the panel opinion and affirmed the decision of the district court. Pet. App. 1a-29a. The court concluded that, be-

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[1] Because the panel held that petitioner was in "official detention," it did not consider whether he had shown that BOP's denial of sentence credit violated his rights under the Equal Protection Clause.

cause the phrase "official detention" in the statute was ambiguous, the court should defer to the interpretation of BOP, the agency charged with administering the statute. *Id.* at 4a-5a. The court then found that the Bureau had reasonably interpreted the statute to exclude time spent at a community treatment center as a condition of release. The court noted that its decision found support in the decisions of every court of appeals that had addressed the issue except the Ninth Circuit. The court also noted that its interpretation of Section 3585 was consistent with the Bail Reform Act of 1984, which draws a distinction between pretrial release and detention. *Id.* at 7a-11a.[2]

Judge Loken concurred on the ground that the term "official detention" had the same meaning as the term "detention" used in the bail statute, 18 U.S.C. 3142. Judge Loken argued that, because petitioner had not been detained within the meaning of the bail statute, he was not in "official detention" under Section 3585. Judge Heaney dissented. In his view, the term "official detention" encompassed petitioner's stay at the community treatment center.

DISCUSSION

Petitioner asks this Court (Pet. 12-25) to decide whether 18 U.S.C. 3585 requires BOP to award him credit against his sentence for time spent at a community treatment center as a condition of pretrial release. We agree with petitioner that the Court should review that issue.

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[2] The court of appeals also rejected petitioner's equal protection claim. Pet. App. 12a-14a. Petitioner does not raise that claim before this Court.

1. Section 3585, which was enacted as part of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, § 212(a)(2), 98 Stat. 2001, and became effective on November 1, 1987, provides that "[a] defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences." The predecessor to Section 3585, which was codified at 18 U.S.C. 3568 (1982), required the Attorney General to award federal prisoners credit toward their sentences for time "spent in custody in connection with the offense or acts for which sentence was imposed." In *United States* v. *Wilson*, 112 S. Ct. 1351, 1354-1356 (1992), this Court held that 18 U.S.C. 3585, like Section 3568, delegates authority to the Attorney General, through BOP, to grant credit against a defendant's sentence for time spent in official detention.

The courts of appeals are divided over whether Section 3585 requires BOP to award credit for periods of residence in a community treatment center, or "halfway house," as a condition of pretrial release on bond. The Fifth and Tenth Circuits agree with the Eighth Circuit that Section 3585 does not require BOP to grant credit against a sentence for the time the defendant has spent in residence at such a facility as a condition of his pretrial release. See *Pinedo* v. *United States*, 955 F.2d 12, 14 (5th Cir. 1992) (no credit under Section 3585 for period of pretrial release spent in a "halfway house"); *United States* v. *Woods*, 888 F.2d 653, 655 (10th Cir. 1989) (same), cert. denied, 494 U.S. 1006 (1990).[3] In contrast,

[3] See also *United States* v. *Becak*, 954 F.2d 386, 387-388 (6th Cir. 1992) (no credit for pretrial home confinement under Section 3585); *United States* v. *Insley*, 927 F.2d 185, 186-187 (4th Cir. 1991) (same); *United States* v. *Zackular*, 945 F.2d 423, 425 & n.2 (1st

the Ninth Circuit has held that BOP's interpretation of Section 3585 to bar the award of sentence credit for a pretrial period of release to a community treatment center is unreasonable and contrary to the statute's plain language. *Mills* v. *Taylor*, 967 F.2d 1397, 1400 (1992).[4]

2. We disagree with the Ninth Circuit's interpretation of Section 3585, and believe that the court of appeals correctly resolved the issue in this case. Because BOP is charged with administering the sentencing credit provision, see *Wilson*, 112 S. Ct. at 1354-1355, its interpretation of Section 3585 is valid unless plainly unreasonable or inconsistent with the statutory language. The plain meaning and legislative history of both Section 3585 and its predecessor, Section 3568, show that Congress did not intend to mandate the award of sentencing credit to defendants released prior to trial on condition that they reside at a community treatment center. "Detention" means "a holding in custody" or "a period of temporary custody prior to disposition by a court." Custody, in

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Cir. 1991) (same); *United States* v. *Edwards*, 960 F.2d 278, 282-283 (2d Cir. 1992) (same).

[4] The courts of appeals have also disagreed about the availability of sentence credit under the predecessor statute, Section 3568, for time spent in a community treatment center, or under other restrictions, as a condition of pretrial release. Compare *Ramsey* v. *Brennan*, 878 F.2d 995, 996 (7th Cir. 1989) (credit not available); *United States* v. *Smith*, 869 F.2d 835, 837 (5th Cir. 1989) (same); *Mieles* v. *United States*, 895 F.2d 887 (2d Cir. 1990) (same); *Villaume* v. *United States Dep't of Justice*, 804 F.2d 498, 499 (8th Cir. 1986) (same), cert. denied, 481 U.S. 1022 (1987), with *Brown* v. *Rison*, 895 F.2d 533, 535-536 (9th Cir. 1990) (credit must be awarded for period in "halfway house"). The Ninth Circuit granted rehearing en banc in *Braun* v. *Scott*, 927 F.2d 1516 (1991), to reconsider its decision in *Brown*, but later dismissed *Braun* as moot. See 938 F.2d 1032 (1991).

turn, is defined as "judicial or penal safekeeping * * * imprisonment or durance of persons or charge of things." See *Webster's Third New International Dictionary* 559, 616 (unabridged) (1976). Thus, detention means "custody," and custody means imprisonment. The term "official detention," therefore, may reasonably be construed to extend only to imprisonment or other strict confinement or control.

A condition of pretrial release requiring a person to reside at a community treatment center does not satisfy that definition. A common sense understanding of "official detention" does not include residence in the environment that is ordinarily found in a community treatment center. Conditions at community treatment centers are neither penal in nature nor nearly so restrictive as the "full physical incarceration" that marks confinement in a jail-like setting. See *United States* v. *Woods*, 888 F.2d at 655. Accordingly, it is reasonable for BOP to interpret "official detention" as not covering periods of pretrial residence in a community treatment center.

The inconsistent rulings in the Eighth and Ninth Circuits regarding the interpretation of Section 3585 will subject BOP to different requirements in different jurisdictions, and will make the amount of time a defendant must serve on his sentence depend on the place of his confinement. That difference in treatment will result in particularly great difficulties in sentence calculation for prisoners who are moved among several different BOP facilities during the service of their terms. A uniform rule is needed. Accordingly, this Court should grant certiorari to resolve the conflict between the court of appeals' decision and the Ninth Circuit's decision in *Mills*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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